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Talking Foreign Policy

Talking Foreign Policy Radio Show
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Talking Foreign Policy Transcripts

Broadcast quarterly, *Talking Foreign Policy* is a one-hour radio program hosted by Case Western Reserve University Law Professor Michael Scharf, in which experts discuss the salient foreign policy issues of the day. The premier broadcast (airdate: March 1, 2012) covered the controversial use of predator drones, humanitarian intervention in Syria, and responded to Iran's acquisition of nuclear weapons. The second broadcast (airdate: May 24, 2012) covered the issues of using drones to kill Americans abroad, the challenges of bringing indicted tyrants to justice, and America's Afghanistan exit strategy. The third broadcast (airdate: September 27, 2012) focused on the issue of presidential power in a war without end. The fourth broadcast (airdate: February 4, 2013) examined President Obama's second term foreign policy team (Kerry, Hagel, and Brennan).¹

In a recent interview, Scharf said: "We want to cover the most salient and interesting foreign policy topics in each program."² Because international policy issues are so prominent in a day-to-day news cycle but often can be difficult to grasp, Scharf pitched the idea for *Talking Foreign Policy* to WCPN 90.3 ideastream, Cleveland's NPR affiliate, late last year. He then lined up a few colleagues known for their ability to discuss complex foreign policy topics in an easy-to-digest manner. Sort of a radio version of the McLaughlin Group, each episode features a regular cast of participants, with Scharf serving as host:

- The ethicist: Shannon French, director of Case Western Reserve's Inamori Center for Ethics and Excellence;
- The military expert: Mike Newton, professor of law at Vanderbilt University;
- The international law professor: Milena Sterio, law professor at Cleveland State University; and

1. Transcript edited and footnotes added by Cox Center Fellows JoAnna Gavigan, Heather Lee, Elizabeth Krupar, Michael Kind, Laura Smolley, and Meghan Kane. In order to improve readability of the transcript, minor editorial changes have been made. Extraneous words have been taken out and replaced with ellipses; none of the content has been changed.

2. "School of Law Professor's Radio Show Gets Green Light: Set to Air March 1," *The Daily*, February 17, 2012, <http://thedaily.case.edu/news/?p=5769>.

- The negotiator: Paul Williams, president of the Public International Law and Policy Group.

The commentators offer listeners a broad expanse of views, as their political beliefs range across the entire spectrum, Scharf said. In addition, the participants strive to make the show casual and sometimes humorous, even when discussing serious topics. Additional experts may join the Group depending on the topic.

Archived broadcasts (both in audio and video format) of *Talking Foreign Policy* are available at: law.ecae.edu/TalkingForeignPolicy. The transcripts of the first four broadcasts appear below.

Talking Foreign Policy, March 1, 2012 broadcast

Participants:

Michael Scharf

Paul Williams

Shannon French

Mike Newton

Milena Sterio

SCHARF: U.S. drone strikes are coming under criticism around the world. Israel is hinting that an attack on Iran's nuclear power plant may be imminent.³ And with respect to Syria, [quote from Michael Newton later in the broadcast] "the real challenge is to transcend the political paralysis and debate into concrete action that actually does something." When you hear about international events like these in the news, do you ever wish you had access to a group of experts who could break the issues down for you and provide their unvarnished opinions? Well, that is what we are providing. This program brings you expert debate on today's pressing issues of international relations. I am your host, Michael Scharf. Our expert panel today will be discussing predator drones, humanitarian intervention, Syria, and the threat of nuclear weapons in Iran. First the news.

SCHARF: Welcome back to the Foreign Policy Roundtable. I am Michael Scharf, Director of the Cox International Law Center at Case Western Reserve

3. "Attacking Iran: Up in the Air," *Economist*, February 25, 2012, <http://www.economist.com/node/21548228>. In the early months of 2012, Iran continued to fortify its nuclear facilities, decreasing its vulnerability to a physical attack by Israel. However, the civil uprising against the Assad regime in Syria (Iran's only significant Arab ally), combined with the Israeli military's increasing capacity for in-air refueling, led many Israeli and American officials to suspect that Israel would launch an air strike on one or more of Iran's nuclear facilities.

University in Cleveland, Ohio. Today, our experts will be discussing the controversial use of predator drones, military intervention against the Syrian regime, and the threat of Iranian nuclear weapons. Our panel consists of an international negotiator, Dr. Paul Williams; a military expert, Colonel Mike Newton; an ethicist, Dr. Shannon French; and an international law professor, Milena Sterio.

SCHARF: We will begin by having each guest tell us a little bit about his or her background. First, our studio affiliate in Washington, DC, Paul Williams. Welcome to the program, Paul.

WILLIAMS: Thank you Michael, it is a pleasure to be here.

SCHARF: Tell us a little bit about yourself for the audience.

WILLIAMS: I am a professor of law at American University here in Washington, DC. I am also the president of the Public International Law and Policy Group, a global pro-bono law firm which advises countries involved in peace negotiations.

SCHARF: How many of those peace negotiations have you done to date, Paul?

WILLIAMS: I have done about twenty-four peace negotiations for PILPG, some successful, some not so much.

SCHARF: So that is our negotiator. In our Cleveland studio with me, we have Michael Newton, who flew in from Nashville to be with us today. Thanks for joining us, Mike.

NEWTON: Thanks Michael, it is great to be here.

SCHARF: And your background?

NEWTON: As a West Point graduate, I served more than twenty-one years in uniform, both in special operations and as a military prosecutor, and I served at the highest levels of the State Department during both the Clinton and Bush administrations. Most recently and relevantly perhaps, I am a professor of the practice of law at Vanderbilt University School of Law in Nashville, Tennessee; a great place to go to school.

SCHARF: Mike is joined in the studio by Shannon French. Welcome, Shannon.

FRENCH: Thanks, Michael. I am currently the Director of the Inamori International Center for Ethics and Excellence at Case Western Reserve University. My research field is military ethics, and before I came here to the lovely city of Cleveland, I taught for eleven years at the U.S. Naval Academy in Annapolis. I am also a member of a research consortium that that is called

CETMONS, which is a consortium on military technologies, military operations, and national security.

SCHARF: Our final expert is Milena Sterio, who recently appeared with me on WCPN's *Sound of Ideas* to discuss piracy. It is good to see you again, Milena.

STERIO: It is good to see you too, Michael.

SCHARF: And your background?

STERIO: I am currently an associate professor of law at Cleveland State University here in Cleveland, Ohio. I specialize in international law, international human rights law, and international criminal law. Before that, I worked as a lawyer at an international law firm in New York City for a number of years.

SCHARF: So we have the right group of experts with us today. Let's kick off this part of the program by talking about the controversial issue of predator drones. For some, these high-tech weapons might conjure images of the Terminator movies in which menacing robots battled against humans. Mike, why don't you start by telling us what a predator drone really is?

NEWTON: Well, I think the first part of your setup is correct. These are war-making machines that are designed to fly over very long distances. They do not rest. They serve two basic functions, the first being surveillance. You can have on-site surveillance for extended periods of time over a precise target. The second function is the one that has been in the news, the targeted dimension.⁴ Not all drones target, but many do, and they bring a capability that is hard to match in other ways.

SCHARF: How many drones would you say that the U.S. possesses at this time?

NEWTON: The absolute number is classified. There are public reports of about five thousand in the inventory that are split between a variety of different purposes and a variety of different authorities.

SCHARF: Who controls them? Is it the Air Force, the CIA, or the military?

NEWTON: The Air Force has a whole branch of people who train in what I call 'the care and feeding.' This includes maintenance issues, uplinks of intelligence and those kinds of things. Regarding the recent strikes, there have been indications in the press of CIA involvement with a heavy CIA fleet as well, which mostly does targeting and some surveillance.

4. See e.g. Charlie Savage, "Pentagon Says U.S. Citizens With Terrorism Ties Can Be Targeted in Strikes," *New York Times*, February 22, 2012, <http://atwar.blogs.nytimes.com/2012/02/22/pentagon-says-u-s-citizens-with-terrorism-ties-can-be-targeted-in-strikes/>. (Discussing the legality of using drones to target U.S. citizens who join Al-Qaeda.)

SCHARF: You mention the press reports. Where is it reported that we have been using these drones?

NEWTON: Primarily, there have been lots of reports recently in Pakistan, the most visible perhaps from the Iranian influence was a surveillance drone that the Iranians were proudly displaying on worldwide television.⁵ Yemen has been in some press reports. I think it is fair to say that there is any number of other classified locations that we do not have public press reports about.

SCHARF: I assume if it is classified, we are not getting the host country's permission to fly over and use the drones. Is that correct?

NEWTON: Many times not, but I think it is fair to say that we may in some cases have either back-channel express or implicit understanding from the host government.

SCHARF: You mention that the drones never sleep. What are the advantages to using the drones over other means of fighting?

NEWTON: The fact is that you have long-term sustained ability over a precise place, such as when you are trying to target the movements and the locations of someone like Osama Bin Laden. It is great to have that on-station presence. Back in the old, old, old days, we had to wait for the earth to turn to have a satellite view and it was cumbersome and problematic. We have solved that problem with drones, provided that you have forward bases where you can refuel and provide maintenance and uplinks, etc. So that is the primary thing. The other thing is that you can reach out. You do not require kinetic force on the ground. You can reach out with lethal force in places that would be extremely difficult, if not impossible, to get in even a very small special operations ground force team. So you can do that with drones and extend your reach.

SCHARF: Let's bring Shannon into the conversation. Your particular expertise, as you just described, is the ethics of high-tech weaponry. Why do some people find that these drones, which seem so effective as Mike just described them, are actually so troubling?

FRENCH: There are a number of issues, but I think the general one has to do with the fact that it feels more like a videogame, and the sense is that the

5. John Walcott, "Iran Shows Downed Spy Drone as U.S. Assesses Technology Loss," *Bloomberg Business Week*, December 12, 2011, <http://www.businessweek.com/news/2011-12-12/iran-shows-downed-spy-drone-as-u-s-assesses-technology-loss.html#p2>. In December 2011, Iran recovered a RQ-170 surveillance drone operated by the United States after it came down in Iranian territory. A video showing the drone appeared on Iran's state-owned Press TV channel.

more it is like a video game, the more we are dehumanizing our enemies. There is a concern that if you do not put skin in the game, that if you are not putting your own troops at risk, then you lose the sense of the moral weight of what you are doing. It makes war too easy. There are many things that people may choose among as a response and it makes that choice a little too fast, so that concerns me.

SCHARF: What about on the other side? If you're a Pakistani or an Afghan and you are used to the nobility of facing your enemy face to face, does the drone somehow make the United States less noble?

FRENCH: Of course it does. If you can imagine being on the ground as either someone who is a combatant or someone who is a civilian and having these lethal robots essentially fly overhead and rain down death, the experience of that is going to make you feel that maybe these folks are somehow supernatural; not literally, but they have that sense of "How do I fight this?," and that just raises the anger level another degree. You also have the sense of "Is there cowardice here? You are not letting me fight back at you, you're just dropping your bombs from this incredibly safe distance." I want to add something here, Michael. I don't know if it gets enough attention, but there is the fact that we do not yet fully know the effect of having troops back here in the U.S. using things like predators and having to switch back and forth from their normal civilian type lives to this kind of killing. Someone could be killing someone in Pakistan and then running out the door jumping in their car and driving to their kid's soccer game. We don't know yet what that does to our own troops. As you mentioned, we do know it affects our heart and mind strategy⁶ at the other end.

SCHARF: I assume it is not just our own troops but the other regular pilots who are looking at their colleagues who are just drone disc jockeys or drone jockeys, and who are safe behind enemy lines. How do they feel about the use of drones?

FRENCH: There is a sense that it interferes with an entire culture, the culture of the pilot. When I was at the naval academy, I used to be able to tell which of my students wanted to be pilots. There was a certain attitude and a certain swagger. That is not necessarily the same type of person as someone who is

6. Eli Berman et al., "Can Hearts and Minds Be Bought? The Economics of Counterinsurgency in Iraq," National Bureau of Economic Research, Working Paper No. 14606, 2009, p. 4. <http://www.nber.org/papers/w14606>. The "hearts and minds" counterinsurgency strategy purports to reduce the demand for rebellion. According to the strategy, when a government keeps a population safe and addresses popular grievances, the population will reward the government with its support.

manning the equipment for these drones; the joystick, basically, of these drones. So you have a clash of cultures that are not always going to respect one another.

NEWTON: Let me interject on that because I think it is critically important to understand that the way you bridge that gap, the idea surfaces a lot that all these are just video games. No, these are trained professional pilots that in many other ways are the absolute epitome of Air Force professionalism. I think that the fighter or jock mentality that you refer to is very resident there and it is just an odd, almost incongruent, idea of a guy wearing this flight suit with his combat patch and picking his kids up from soccer. That does happen. So what is the check in that system? I think it is critically important to understand the absolute professional ethos of the war fighter mentality that says 'I am a professional and as a professional, I have particularized, very rigid rules of conduct and rules of expectation and both legal and ethical dimensions as to how I do it and it is not a video game.' I think in some ways, some of the people that I have talked to who do this have erred on the side of being so conscientious of that line that in some cases they have hesitated. The nice thing about drones is that they are kind of a one shot deal, no pun intended. You cannot take a particular target and then take your time to go back to the legal/ethical framework, to go back to the target methodology and take that same target at another time and another place when it is perhaps more appropriate or more lawful.

SCHARF: What you are saying, Mike, might well be true but a lot of this is about perceptions. I note that you can actually watch a real video of drone-targeted killings on YouTube now.⁷ Let me bring Paul into this discussion. Paul, you have negotiated peace agreements with a dozen countries. From your perspective as a peace negotiator, do you think that the expanded use of drones may make it harder for Americans to win hearts and minds in places like Afghanistan, Pakistan, and Iraq?

WILLIAMS: Well, look Michael, I think we have to be honest with ourselves here. The approach and the strategy of hearts and minds did not work in Iraq. It is failing in Afghanistan and it is certainly not going to work in Pakistan. Quite frankly, I think we have shifted our methodology from hearts and minds to scare and kill the bad guys. The drones are just a symptom of this fundamental shift. They allow it to happen and they allow us to be very effective at the scare and kill approach.

7. See "Hunter Killer Drone Strike," YouTube video, posted by "noahmax6000," February 28, 2007, <http://www.youtube.com/watch?v=3PjR8v1njsg>.

SCHARF: Okay, so we heard Mike mention earlier that the drones are sometimes controlled by the CIA and not by the regular armed services. I understand that the critics of the CIA are saying that having the CIA operate the drones creates an accountability void. Is that something that we should be concerned about?

WILLIAMS: No, I do not think we should be concerned about that. The same law applies to the CIA as it does to the other armed forces. There is this notion that you pick up from the movies of the *rogue agency*. No, we should not have to worry about the CIA. We should worry about the American people. The reality is that the American people now, for whatever reason, are more likely to accept more civilian casualties, more collateral damage, in order to kill the bad guys. Now, on the one hand, this actually makes it easier to kill the bad guys, as there is a lot less to worry about in terms of moral outrage. On the other hand, it erodes our moral core, both as Americans and as human beings, and that is kind of worrying.

SCHARF: Well, Paul, you said that the CIA plays by the same rules. I do not know how we would know that definitively. We do know that when it came to Guantanamo Bay, there was concern that the CIA had created a law-free zone and that they were not playing by the same rules. What is your take on that, Milena?

STERIO: First of all, let me respond to something Paul and Mike have raised. Clearly it is sort of in our interest to go after the bad guys to scare them, to kill them if we feel like they are threatening our national security. But, from my perspective as a professor of international law, I do think that there are serious concerns regarding the use of drones under international law. To justify our current policy of using drones, and the way that we are using them, you have to make a certain number of assumptions and believe that every single one of those assumptions is true. So you have to believe that 9/11 was an act of war and that we are in a global war of terror. All these targets are enemy combatants and the battlefield moves with them, so wherever you are, you can target them. Every single one of those assumptions is questionable, so I do worry about our use of our aggressive policy and compliance with international law.

SCHARF: Well, I think this debate is going to continue on the national scene since the Obama administration is committed to rapidly increasing the number of drones. It is time for us, however, to take a short break. When we return we are going to be discussing the issue of intervention to halt atrocities in Syria. Stay with us.

SCHARF: Welcome back to Foreign Policy Roundtable on WCPN 90.3. I am Michael Scharf, and I am joined by Mike Newton of Vanderbilt, Shannon French of the Inamori Center, Milena Sterio of Cleveland State University and in DC we have Paul Williams of the Public International Law and Policy Group. We have been discussing the pros and cons of predator drones. In our second segment today, we will debate humanitarian intervention to stop the killing in Syria. In March, the Arab Spring protest spread to Syria. Just as Muammar Gaddafi did in Libya, the Assad regime has used deadly military force against the Syrian protest movement, resulting in over five thousand deaths so far, and that figure seems to be rising every day. Shannon, let's start with you. What is the situation on the ground in Syria right now?

FRENCH: Well, the broad answer is violent and unstable. The kind of language that we hear coming out of Syria is chaotic. It has to do with these clashes between these government troops and the rebels which happen in the capital city, the suburbs, and some of the southern villages. We get more and more reports of death. There is an ebb and flow to it and sometimes it seems to dial back a little. But it doesn't seem like it is going to go away any time soon.

SCHARF: And who are the protesters?

FRENCH: It is interesting because, on the one hand, there has not been an attempt to organize a political opposition. There is something called the Syrian National Council⁸, and that includes representatives from the Damascus Declaration group, which is a prodemocracy network. There is also the Syrian Muslim Brotherhood, which is an Islamic political party, various Kurdish factions and local coordination committees. But the majority of people protesting in the streets appear to be unemployed youths.

SCHARF: Why should we care about what Assad is doing to unemployed youths in Syria?

FRENCH: I am an ethicist, so I think we ought to care simply because the protesters are fellow human beings whose rights are being violated, so that is enough right there, and they are demanding freedom and democracy, which we claim to share. But if a more pragmatic reason is required, recent and current governments of Syria have been obstacles to peace in the region.

8. "SNC Objectives," *Syrian National Council*, last modified November 29, 2011, <http://www.syriancouncil.org/en/objectives.html>. The Syrian National Council is a revolutionary proto-government that aims to provide an interim government and a roadmap for democratic change in post-Assad Syria. The SNC also mobilizes support for and represents the Syrian Revolution in the international community.

Now, do we know if a new government would be any better? We do not know that. It is a roll of the dice and I certainly would not support an Iraq-type intervention, but I do not know, maybe something like what we did in Libya. Perhaps I would need to hear more about the options.

SCHARF: And the death toll there is actually greater than Libya's, is that correct?

FRENCH: That is correct. Unfortunately, it is continuing to climb.

SCHARF: Paul, what are the options that are currently being considered for responding to this crisis?

WILLIAMS: Well, Michael, there is a whole array of options. If you are the Russians, you are considering selling them more weapons so that Assad could do this even quicker and carry out more atrocities against his own people. If you are the Arab League, fortunately they have become very aggressive lately. They are seeking regime transition. They would like to see Assad set aside and have one of his deputies take his position and transform the regime. Turkey, more aggressive, is calling for humanitarian zones and there are even a few countries like Qatar and Saudi Arabia directly calling for regime change. I think there is a lot on the table and it is very eclectic and it is very disorganized, but I think the international community is beginning to coalesce around some serious action and maybe even humanitarian intervention.

SCHARF: So the situation is very similar to the way it was this summer in Libya. Why does Russia say it will veto at the Security Council any proposal to authorize humanitarian intervention in Syria?

WILLIAMS: Well, Russia has Syria as a client state. We can talk about whether they were surprised by what happened in Libya and they can talk about international law. The reality is that the Russians have a relationship with Syria. They have a very lucrative arms trade with Syria and it suits their interest to have an element which is destabilizing the Middle East, which in large part is an American and European area of significant interest.

SCHARF: At the Security Council last summer, they passed a resolution⁹ that authorized the NATO forces to bomb and to assist in the Libya situation. The Russians are now saying that they felt deceived. They said that they didn't think that the Security Council resolution went that far—that it was designed to protect Libyan civilians and it was morphed somehow by the West into a bombing campaign that led to regime change. So, Milena, what is the story behind that?

9. S.C. Res. 2009, U.N. Doc. S/RES/2009 (September 16, 2011).

STERIO: I do think that there is an element of the Russian sentiment that they were being deceived. That is true in the sense that the Security Council resolution regarding Libya, I think, was purposely vague. It was drafted to say that we are going there to protect civilians, and who knows where that could lead. On the other hand, Shannon mentioned this concern about fellow human beings being slaughtered or their human rights not being respected, and there are a number of other areas in the world like Syria where there are significant violations taking place, and nobody is really talking about it. For example, Uzbekistan is one of those areas.¹⁰ For the United States, Uzbekistan tends to be a strategic area. We go through there to send our supplies to Afghanistan, and we kind of need Uzbekistan on our side. There is also Bahrain, where significant human right violations took place last summer or last spring,¹¹ and we have not really seen much involvement. That being said, I do think now there is a serious situation in Syria. I do think that I would support Shannon's proposal for some kind of a humanitarian-type intervention.

FRENCH: I would just like to say that I certainly agree with Milena, and even though our humanitarian intervention policy in the past has not been consistent and probably won't be consistent, that, in and of itself, should not be used as an argument against intervening. The fact that we do not intervene everywhere, where we perhaps should or could, often gets raised as an argument for not intervening here and that really troubles me. If you cannot do everything, you should still do something where you can.

SCHARF: So let's assume American policy makers agree with you and they would like to intervene, but the Russians are threatening a veto. Let me turn to Mike. Does international law allow humanitarian intervention if it is not approved by the Security Council?

NEWTON: Well, that is the \$64,000 question. You should tell me. In fact, there are very few instances in history of what I call pure humanitarian interventions. They are always coming up with political circumstances regarding political refugees, economic ties, and a whole variety of other circumstances. So to ask

10. "World Report 2012: Uzbekistan," *Human Rights Watch*, <http://www.hrw.org/world-report-2012/world-report-2012-uzbekistan>. Human Rights Watch described Uzbekistan's human rights record as "appalling." According to the report, authorities severely restrict freedom of expression and target journalists, civil society activists, and opposition members.

11. Alex Delmar-Morgan, "Protests, Investigator Pressure Bahrain," *Wall Street Journal*, March 11, 2012, <http://online.wsj.com/article/SB10001424052970204603004577271481007329636.html>. In early 2011, thirty-five people were killed and nearly three thousand were arrested when the Sunni-led Bahraini government violently put down a mainly Shiite protest movement.

that simple question—in one way there is sort of a false assumption that there is a purely humanitarian basis. We are past that. I would say that we are in the age of YouTube and Twitter. So Saddam slaughters thousands of Kurds in the fall of 1988¹² and it is very possible for the world to say, well, we did not know in time.—we were not positioned to take action. We have seen that change, so we did take action in Kosovo¹³ because of very clear, timely information from incredible reporters on the ground and, in this case, U.S. diplomats. I was there. So we took action in Kosovo, which was the first clear example where we had after-the-fact de facto recognition by the Security Council. So the short answer to your question is that it is an open issue against this entire backdrop of very strong, very clear human rights law and what we call crimes against humanity law that says these things are criminal. These are the most serious crimes, the most serious violations in the world. We have to do something about it.

SCHARF: Paul, Mike mentioned the 1999 NATO bombing campaign to halt the ethnic cleansing in Kosovo. You have written about this. I know that the 1999 intervention was not authorized by the Security Council. Russia was threatening to veto back then as well. Was that bombing campaign seen as lawful or legitimate?

WILLIAMS: I think there are a lot of similarities between what happened in Kosovo and what is happening in Syria at the moment. The first step was to find ways through the Security Council, through the General Assembly, to wrap it up in a legal bow. But in both cases the simple reality was and is that humanitarian intervention is inevitable. We all knew what Milosevic was going to do in Kosovo. He was going to do bad things. We know what Assad is going to do in Syria. We are trying to put it into legal context through the United Nations, but if that does not work, there are players out there—if it is humanitarian safe zones or arming the free Syrian army, there will be humanitarian intervention to stop this. As Mike says, in the context of YouTube and basically instantaneous information about these atrocities, fortunately the ethical core of the international community is still there and will not allow it to happen. The sooner they get in and stop it, the better.

12. "Anfal: Campaign Against the Kurds," *BBC*, June 24, 2007, http://news.bbc.co.uk/2/hi/middle_east/4877364.stm. In 1988, the central government in Baghdad executed nine military campaigns to exterminate the Kurdish population of northern Iraq. Thanks to the government's use of chemical weapons, such as mustard gas and sarin, up to a hundred thousand people perished in the genocide.

13. "Bombing Still Pain Serbs," *BBC*, March 24, 2009, <http://news.bbc.co.uk/2/hi/europe/7960116.stm>. After peace talks failed to stop Serbian military action against Albanian separatists in Kosovo, NATO launched an eleven-week bombing campaign on March 24, 1999.

SCHARF: Well, Milena, if we do see humanitarian intervention without the Security Council's authorization and there is condemnation by the international community, what is the effect?

STERIO: I agree with Paul that the effect is similar to the one in Kosovo. The difference being obviously that now Syria is farther from the NATO zone of influence, so it is very unlikely that NATO is now somehow going to get involved. I think one possible outcome from the perspective of international law is to say these kinds of things. Even though at the time they may be viewed as violations of international law, they actually serve to create new norms of international law. So we see the development of a customary norm of international law which is this paradigm of humanitarian intervention.

FRENCH: Now I sound like the cynic, but I want to say if it turns out well, then public opinion shifts and the law adapts. If it turns out poorly, then they say, see, we told you so.

SCHARF: Well, after the Kosovo intervention, the countries of the world got together and came up with some new doctrine that they called "responsibility to protect."¹⁴ There is a bumper sticker, R2P, as they call it, and the Security Council and the General Assembly endorsed that doctrine. Would that doctrine apply to this situation? What are the requirements of that doctrine?

STERIO: I think that doctrine actually would apply to this kind of a situation. It basically says that in this kind of a situation where in a sense there is a sovereign, but that sovereign does not play by the rules the same way that maybe Milosevic did not play by the rules, or Assad does not play by the rules, then the other states have a responsibility to protect the citizens of that state. On the one hand, it goes against this very supreme norm of territorial integrity and the respect for sovereignty of other states and on the other

14. Office of the Special Adviser on the Prevention of Genocide, "The Responsibility to Protect," <http://www.un.org/en/preventgenocide/adviser/responsibility.shtml>. The responsibility to protect is a United Nations genocide prevention mechanism consisting of three pillars:

The state carries the primary responsibility for protecting populations from genocide, war crimes, crimes against humanity and ethnic cleansing, and their incitement;

The international community has a responsibility to encourage and assist states in fulfilling this responsibility;

The international community has a responsibility to use appropriate diplomatic, humanitarian and other means to protect populations from these crimes. If a state is manifestly failing to protect its populations, the international community must be prepared to take collective action to protect populations, in accordance with the charter of the United Nations.

hand, now that you have violated those sovereignty rules, you do not get to be a sovereign any longer.

NEWTON: Well, that is important, because I think what Milena points out is the changing priority of international norms. Sovereignty, really since World War II, has not been the dominant narrative of international law; it has been supplemented in so many other ways by human rights norms, by international criminal norms, and by this R2P doctrine. The real challenge, though, is to transcend just the political paralysis in the political debate into an effective action that actually does something.

FRENCH: Can I point out the connection to the last topic we went over about drones? In that case, the argument had to do with, well, yes, we can use drones even if they are violating the sovereignty of another country in order to achieve our aims. Here, where some folks might be trying to use sovereignty as an excuse to not do something that has ethical weight behind it, so I think we can call people on that and say you can't use sovereignty as a cover just because you do not want to do something, and yet dismiss it completely when you do want to do something.

SCHARF: Well, let's turn then from the legal question to the practical question, and I will ask Mike this: From a military standpoint, what would successful intervention into Syria and how is it different from our recent experience with Libya?

NEWTON: Well, there are at least two fundamental things that come to mind when you ask that. One is that there is a very, very long debate, not only in U.S. military circles, but in worldwide military circles about the balance between pure air power, between whether they be drones or stealth bombers, or any other approach. Pure air power and ground power: there were a long line of developments that say we can use overwhelming force and achieve this only through the air. As an army guy, I will tell you this is wrong. It has been proven wrong in every context, most recently Libya. Imagine Libya with just NATO air cover and no on-the-ground people. In Afghanistan, we conquered Northern Afghanistan with very small teams of international operators and a whole range of allies on the ground. So that is the first problem. You need to have an integrated in the air/ground campaign, which then raises the second real problem in that particular context, which is that you do not have any viable, at least conceivable right now, mechanisms for moving in large troops for supporting them—for really seizing control. As Paul said, even if you want to set up a safe haven or safe zone, that requires

on-the-ground perimeters of troops to protect them. Even if they are not our troops, they are allies that we are supplying, we are equipping, we are rearming, and training in some cases. So that is a real fundamental problem. How do you have a viable effective ground presence that respects the role? And remember the whole point is that we have a concrete force that respects the rule of law. That implements the laws and customs more appropriately. That takes a big effort on the ground and we are just not in position to do that.

SCHARF: So as difficult as it is to do that, it might be possible that there is still going to be action on the ground. Let me go back to Paul and ask him: what do you think the likelihood is that the intervention might lead to all sorts of grim outcomes—a stale mate, regional conflicts, de facto partition, sectarian cleansing?

WILLIAMS: Well Michael, those of us who are arguing for or who are in favor of humanitarian intervention, we have to be candid. Any change in Syria is going to be destabilizing; that is simply a fact when you are going to topple an authoritarian dictatorial regime and replace it with democracy. That is going to be difficult; it is going to be complicated. We have seen that in Libya.¹⁵ Here, in Syria, we have the fact that there are serious strategic interests for Iran and Syria. The Hezbollah has a very serious interest in Syria.¹⁶ You have large minority communities—the alawites, the druze, the shi'a. They are going to fear for their security under changed circumstances. I do not think we can be naive about it if humanitarian intervention is going to lead to a flowering democracy, but the alternative is a totalitarian regime that continues to and could literally threaten and kill its own people.

SCHARF: Mike, do you want to add to that?

NEWTON: Well, I think that Paul raises an excellent set of points and this goes back to what I said about a pure humanitarian intervention and, in the context of Syria, I think it is fair to say it cannot be cauterized. You cannot

15. See Sean Lynch, "An Invitation to Meddle: The International Community's Intervention in Libya and the Doctrine of Intervention by Invitation," *Creighton International and Comparative Law Journal* 2 (2012): 173, for an evaluation of the international community's intervention in Libya.

16. See e.g. Babak Dehghanpisheh, "Hezbollah Increases Support for Syrian Regime, U.S. and Lebanese Officials Say," *Washington Post*, September 26, 2012, http://www.washingtonpost.com/world/hezbollah-increases-support-for-syrian-regime-us-and-lebanese-officials-say/2012/09/26/d1970396-0591-11e2-aff-d6c7f20a83bf_story.html; and Adam Entous and Farnaz Fassihi, "Hezbollah Helping Assad, U.S. Says," *Wall Street Journal*, August 10, 2012, <http://online.wsj.com/article/SB10000872396390443404004577581073528920242.html>.

contain it. Shannon pointed out there are implications for the larger regional peace process. There are implications for Hezbollah. There are implications for all kinds of Iranian influence. In fact, I can hear the cynics saying, well, this is all just a cover to go fight a proxy war with Iran. You have to be clear that there are a whole range of consequences and we can plan for them, and we can foresee them from to the extent possible, but this is not just a pure, simple, moral, ethical, legal issue that we can neatly categorize and neatly contain. It is incredibly complicated and, if we know nothing, we know that we are going to find a lot of consequences that we cannot plan for.

SCHARF: Shannon?

FRENCH: Well, the recent historical context, I think is so relevant because people are scarred from what happened in Iraq and the sense, fair or not, we did not do a good job of anticipating what was going to happen next and after that had so much harm follow on from having to scramble to figure out, well, how do we respond to what actually has occurred. So I think there is a real fear out there and frankly it reminds me of after Somalia: the Somalia intervention and the problems that occurred there. For a long time we were shy to do anything similar and some people even blame the inability of the international community to help in Rwanda¹⁷ on that.

STERIO: So just to come back to Paul's original about being candid about what we can do in our humanitarian intervention, I do think though that it is relevant to have some kind of an end goal in mind. In other words, yes, in the short term we are going there to stop violence against civilians, but in the longer term and maybe not over twenty years, but maybe in the next two to three years, what are we trying to achieve? Shannon brings out an excellent point of all these other places, Afghanistan also being one of them, and now we are withdrawing from Afghanistan and who knows what is going to happen. Egypt, where Mubarak was toppled, and now we have basically renewed violence and the revolution is ongoing.¹⁸ Libya is basically a mess. So I do think we need to have some end goal—not necessarily end goal, but a longer-term goal in mind.

17. See Scott Baldauf, "Why the U.S. Didn't Intervene in the Rwanda Genocide," *Christian Science Monitor*, April 7, 2009, <http://www.csmonitor.com/World/Africa/2009/0407/p06s14-woaf.html>.

18. See "Egypt News—Revolution and Aftermath," *New York Times*, October 19, 2012, <http://topics.nytimes.com/top/news/international/countriesandterritories/egypt/index.html> (Providing a comprehensive description of the ongoing events in Egypt).

SCHARF: And while we are thinking about intervention in Syria, we have got this looming problem of a nuclearized Iran, which might also need a military approach. You are suggesting that our means are limited. So let's take this opportunity to take another break and when we come back we will be looking at the international threat from nuclear weapons in Iran.

SCHARF: We are back with foreign policy roundtable. We have been debating the use of predator drones and how to respond to the humanitarian crisis in Syria. In our final segment today, our expert panel will discuss the options for countering the threat of nuclear weapons in Iran. A recent headline of a major U.S. newspaper declared, "August Surprise? Iran could have fuel for the bomb before U.S. elections, study says."¹⁹ Shannon, let's begin with you. Iran insists that its uranium enrichment program is aimed at producing civilian power only.²⁰ Why does the International Atomic Energy Agency in the United States believe that Iran is using the uranium to start to build nuclear bombs?

FRENCH: Okay this is for the Star Trek fans out there, "Damn it, Jim, I am a philosopher, not a physicist." I don't know—I am not an expert so I cannot explain it in technical terms, but I gather it has to do with the way they are enriching this particular uranium. There are different uses and they require different enrichment levels and I gather that Iran's uranium is being enriched to 20 percent purity and that is the quality or the level of quality required for nuclear weapons.²¹

SCHARF: So, is there any chance that this will be like Iraq was in 2003 where the U.S. intelligence and the UN mistakenly concluded that Iraq had obtained yellow cake and it was building nuclear bombs?²²

FRENCH: Well again, I don't know but if it is, their reaction is going to be magnified by the comparisons to the past and I think that the fallout from that would be tremendous.

19. See Howard LaFranchi, "August Surprise? Iran Could Have Fuel for Bomb Before U.S. Election, Study Says," *Christian Science Monitor*, February 1, 2012, <http://www.csmonitor.com/USA/Foreign-Policy/2012/0201/August-surprise-Iran-could-have-fuel-for-bomb-before-US-election-study-says>.

20. Tanya Ogilvie-White, "International Responses to Iranian Nuclear Defiance: The Non-Aligned Movement and the Issue of Non-Compliance," *European Journal of International Law* 18 (2007): 453, 457.

21. See Jay Solomon, "Report Finds Iran Is Closer to Weapons-Grade Fuel," *Wall Street Journal*, October 9, 2012 <http://online.wsj.com/article/SB10000872396390443294904578046721515565966.html>.

22. See Michael Duffy and James Carney, "Iraq: A Question of Trust," *Time*, July 21, 2003, <http://www.time.com/time/magazine/article/0,9171,1005234,00.html>.

SCHARF: Paul, let's go to Washington and bring you into the conversation. What do you think the G.O. political effect in the Middle East would be if Iran got nuclear weapons?

WILLIAMS: Well I think it would be very, very destabilizing. I think it is important to understand how we got to this point. I think diplomatically, the Americans and our allies, essentially went out into the sand, dug a big hole, and stuck our heads into it. We have tried to convince ourselves that if we could just delay the acquisition of a nuclear weapon by Iran that there might some regime change. We fail to understand the fundamental drive for the Iranians for a nuclear weapon. It is not Ahmadinejad's bomb, it's the Iranian political entity that seeks to have an atomic weapon for political leverage, for sovereignty, and because they have seen what having a weapon does with the Koreans in Pakistan and they have seen what not having a weapon does, in terms of Libya.

SCHARF: Now Paul, the North Koreans claim they got the nuclear bomb because they wanted to protect themselves from a nuclear invasion—that if Iraq had had the nuclear bomb it would not have been invaded in 2003. That was their argument.

FRENCH: The nuclear umbrella, right?

SCHARF: Is that what Iran is looking at or is Iran trying to take its power and project it throughout the region by having this nuclear threat?

WILLIAMS: Think about the current situation of Iran, it sees itself as deserving of a seat at the international table. It does not have that seat. Saudi Arabia has that seat. Saudi Arabia is its long-term protagonist in the region. Essentially Iranians have been shunted aside. They are thinking that they need to protect their sovereignty, they want to be at the table making the important decisions and they want to replace Saudi Arabia as the major player in that region. It cannot do it with the Americans protecting the Saudis, so you need a weapon in order to basically protect their G.O. political interests.

SCHARF: Mike do you think that Israel or the United States should be afraid that if they had the bomb that they would use it?

NEWTON: Well let me back track ten seconds and agree with Paul, and this often gets overlooked is a Persian-Arab-schism. Not just the religious schisms or the regional schisms but...Secretary of State Clinton said this is a game changer precisely because the stated purpose is to take this weapon and use

it against Israel.²³ Yes, it is a game changer. There is a clear denial of the right of Israel to exist as a nation state. So yeah, Paul is right, this is a huge regional source of instability and it is a game changer. Especially, and it is very difficult for us from this side of the water, these are intellectual issues to us. To the Israelis these are visceral and motive issues; this is truly an existential threat to them in a way that we have not experienced in our culture.

SCHARF: Well Mike, speaking of Israel, its defense minister, Ehud Barak, recently hinted that Israel is ready to attack Iran's nuclear reactors saying that Israel would rather have its diplomatic solution, [but] all options are on the table.²⁴ Would such an attack be lawful under international law?

NEWTON: The technical legal answer and I think the ethical answer is, it would depend on the immanency and the clear demonstration on a demonstrable threat that is imminent and the technical legal language is "proportionate response."²⁵ I think Shannon is exactly right to go back in the gestalt of the region. Where have we seen this play before, of denial and obfuscation, and regime that exercises deceit in order to obtain its own purposes of the entire western community with the continued engagement of the Security Council? This is Iraq all over again. We have seen this play and it did not turn out so well. But this is different in the sense that this is compounded in a way that you did not have in Iraq with bellicosity and express statements about using this weapon, developing this technology in a clear way that threatens the very survival of a neighboring nation in the region. I think that Paul is exactly right. A big part of all this is to aggrandize politically influence. So, if an attack is directed just to help balance out political influence that is a problem under international law. If an attack is focused on a clear imminent articulate demonstrable threat and that attack is proportionate in its response, international law clearly allows Israel or any other state to use the degree of force necessary to eliminate the threat. Shannon is exactly right—the key is demonstrating that threat.

23. See e.g. Ethan Bronner, "Just How Far Did They Go, Those Words Against Israel," *New York Times*, June 11, 2006, http://www.nytimes.com/2006/06/11/weekinreview/11bronner.html?_r=0, (discussing Iranian President, Mahmoud Ahmadinejad's statements to "wipe [Israel] off the map").

24. See e.g. Jodi Rudoren, "Israeli Defense Minister Keeps All Options Open on Iran," *New York Times*, April 30, 2012, <http://www.nytimes.com/2012/05/01/world/middleeast/barak-says-all-israeli-options-remain-open-on-iran.html>.

25. Thomas M. Franck, "On Proportionality of Countermeasures in International Law," *American Journal of International Law* 102 (2008): 715, 716.

SCHARF: Well Milena, we are not acting in a historic vacuum here. Iraq actually had a nuclear reactor called the Osiris Nuclear Plant that Israel bombed in 1981. What was the world's reaction to that?

STERIO: That is right, Michael. Back in 1981, Israel at the time, I am presuming through intelligence ports, decided that Iraq that had this nuclear reactor was a threat because they were obviously going to develop a nuclear weapon. Israel sent at the time a squad of planes that then bombed the nuclear reactor, destroyed it and in the attack eleven people were also killed.²⁶ I am hesitant to say civilians because some people would say they were not exactly civilians if they were engaged in the production of a nuclear weapon, but by all accounts they were scientist involved in that project. The international community at the time was swift in condemning Israel. There was a Security Council resolution condemning the attack asking Israel to pay reparations. There was a UN general assembly resolution asking for the same thing and even the International Atomic Energy Agency also condemned Israel. Now some people would say, that was back in '81, rules have evolved and changed, but I think Mike is correct in pointing out that it does hinge on the immediacy of the threat. How certain are we that Iran is building these nuclear weapons and they are going to use them?

FRENCH: I think that just war theory makes this distinction between preemption and prevention. We are all talking about that right here, and it is preemptive war when you can, as Mike was ably describing, when you can prove that they are about to attack. The original paradigm for that was that the troops are assembled on your border; can you fire at them right now? Well, yes you could, that was allowed. It is a very different thing when you skip on into this preventative war where you are not sure as clearly if the attack is imminent.²⁷

SCHARF: But doesn't it change when the kind of attack is nuclear weapons with total obliteration?

FRENCH: Well this is the language right, we heard the first sign of attack may be the mushroom cloud, and maybe that was rhetoric that did not make as much sense in one case, and maybe it does make more sense in this case.

26. Anthony D'Amato, "Israel's Air Strike Against the Osiraq Reactor: A Retrospective," *Temple International and Comparative Law Journal* 10 (1996): 259.

27. Mark L. Rockefeller, "The 'Imminent Threat' Requirement for the Use of Preemptive Military Force: Is It Time for A Non-Temporal Standard?," *Denver Journal of International Law and Policy* 33 (2004): 131.

NEWTON: I think Milena is exactly right to describe the public political fallout, but do not forget, behind closed doors, there are high fives in the foreign ministries all around the world when the Israelis take out an imminent budding nuclear threat in those days. So this all operates against a very complex background of politics, and yes, the law, and yes, the human rights, and I know some ethicists who would argue, wait a minute, it is infinitely better to have a small amount of damage now, than waiting until we are dealing with a real omnipresent risk of mushroom clouds. That is a much more dangerous situation in, say in five years, or seven years, or however far into the future.

SCHARF: Shannon, would you be one of those ethicists?

FRENCH: I am not sure because we are also skipping toward the territory of assassination as well because these same sort of arguments come into play when you say, well, if you could just kill these very few specific people you could take care of the problem, and there are some practical arguments for that, but I worry about whether we are eroding key principles that we are going to wish we had later on.

SCHARF: Paul, what is your take on this?

WILLIAMS: I think one of those key principles that we have eroded is deterrence. We are all here talking about will there be an attack, is there any nuclear facilities, and in part because we got on this diplomatic path of negotiate-negotiate. We skipped over the path of serious deterrents. There was an opportunity early on, after the changed circumstances in Iraq, where the Iranians were anxious about what our military capabilities and intentions were, and even now we are talking about the use of force, but we are not putting ourselves in a strong deterrent position both with economic sanctions, but we have come to them both, but very timidly and very tardy. We have not positioned our Air Force assets in assertive positions around that make a credible deterrence and I am a little worried that we have been caught off guard, yet again.

FRENCH: Although we are using the dolphins,²⁸ I understand.

WILLIAMS: I don't think that scares the Iranians too much.

28. See e.g. John Hudson, "The Navy is Depending on Dolphins to Keep the Strait of Hormuz Open," *Atlantic Wire*, January 13, 2012, <http://www.theatlanticwire.com/global/2012/01/militarys-weapon-against-iranian-mines-high-tech-dolphins/47384/#>.

SCHARF: Isn't it true that we have put computer bugs²⁹ that have destroyed their—or set them back, also apparently there have been assassinations of their nuclear scientists.³⁰

WILLIAMS: But that is the whole concern. It is this whole piecemeal. If we could just slow it down. There needs to be a strong—if we are going to avoid the actual use of force, there has to be a strong signal of deterrence. It is sort of a catch-22, but you have to position yourself to use serious force so you do not have to. We have not positioned ourselves that way. We have messed around with software bugs and then as you guys indicated, presumably targeted assassinations, which isn't necessarily a better alternative to serious deterrents.

STERIO: While I agree with Paul, the deterrents are necessary but I think deterrents are useful if we have decided ahead of time that the use of force would be lawful. I share Shannon's concerns about have we reached that point, Yes, Iran is a serious threat, but presumably there are other places in the world that are serious threats, and we do have to respect the rule of law and any time we engage in these preventive strikes, we may be crossing that line and it is a slippery slope. I do think that deterrents are important, but that determination that we are ready to use force if necessary and we think that it is legal, I think that is extremely important here.

SCHARF: Now Milena, before when you were describing the earlier Israeli attack on Iraqi nuclear reactor, you described it as being way out in the desert and eleven scientists were killed. It could have been done with a lot of precision and there were not many deaths. On the other hand, U.S. defense secretary Leon Panetta said that even the most sophisticated U.S. bunker buster bombs are not powerful enough to penetrate all of Iran's defenses.³¹ Israel's Vice Premier, Moshe Ya'alon, very recently said that Iran's nuclear weapons installation are vulnerable to military strikes. Let's go to our military expert Mike. What is the correct analysis here?

NEWTON: Well, I tend to follow the military professionals, but by the time we get to the core questions about military experts and military capabili-

29. See David Sanger, "Obama Order Sped Up Wave of Cyberattacks Against Iran," *New York Times*, June 1, 2012, <http://www.nytimes.com/2012/06/01/world/middleeast/obama-ordered-wave-of-cyberattacks-against-iran.html?pagewanted=all>.

30. "Iran Car Explosion Kills Nuclear Scientist in Tehran," *BBC*, January 11, 2012, <http://www.bbc.co.uk/news/world-middle-east-16501566>.

31. Elisabeth Bumiller and Jodi Rudoren, "U.S. and Israel Intensify Talks on Iran Options," *New York Times*, August 1, 2012, <http://www.nytimes.com/2012/08/02/world/middleeast/in-israel-panetta-warns-iran-on-nuclear-program.html?pagewanted=all>.

ties you have to take a step back. What the military is going to want if in fact there is military action here, is a clear mission, a definitive playing state that they can plan against. What they don't want is a strategic naivety that we have displayed to say to the military: go do this and anything else that comes along after the fact and whatever we are also going to task to you because we are going to presume that you are capable. That is a recipe for the ultimate strategic disaster. I do think, to tack onto Milena's point, we did miss a critical strategic window back several years ago when their outcry, popular outcry from the Iranian people, might have achieved regime change in a nonmilitary way. In a completely legitimate way of people rising up and saying, I want human dignity. I want my human rights preserved from the regime. Oh by the way, regime change that might or might not have changed the situation—we sat silently by, so the military looks at that and says that is all ancient history. The military says, give us a clear-cut mission and we will do our very best to plan for it and in military parlance, we will not lose. If it does not work, we will try something else until we accomplish the mission. I think that is the mindset going in.

SCHARF: Apparently, while we sat silently by, Iranians were not so quiet. They were digging this new nuclear processing plant way underground and they were burying it under a major population center. So this does seem to be a different kind of military operation than the Israelis took twenty years ago. If they have to attack and kill a whole city or if they have to use nuclear weapons to penetrate that far underground, how is that going to change the equation?

STERIO: Well, now you are getting into the heart of international humanitarian law, the rules that apply to the way you can fight a war and I think that Mike already mentioned this proportionality analysis. You can do things if you think that the military objective you are trying to achieve will not be outweighed by the civilian casualties, nonmilitary casualties you are going to cause. So if for example, we are calculating and we are trying to figure out if destroying this Iranian nuclear reactor that is our primary military goal and that is going to cause three thousand civilians to die, you would have to say if we are going to destroy the reactor, does that outweigh the civilian death. That is a very complex calculus and I do think that policy makers in the United States and military commanders when they perform those kinds of calculations, I think they are extremely careful and extremely respectful of the rules that we have.

NEWTON: Let me just add the school lessons for the day for our listeners. All commanders, especially NATO commanders and western and especially U.S. commanders, have the legal obligation, and here is the language from the protocol, to do all means feasible to minimize or eliminate all proportionality analysis, the kind of civilian damage to civilian lives and civilian property. So the point is that there is a huge range of options and a whole variety of decisions and it is an incredible complex decision-making process both the targeting model ones and the alternative ones. What is feasible, what is practical, and then try to anticipate the collateral consequences both in terms of damage and destruction, but also to the larger mission. This is why it is very important to give the military an instate that they can plan against.

SCHARF: This balance that you are talking about where you can balance the collateral damage and you were talking about proportionality—it's always in terms of proportionality to a threat. So in this case the threat is nuclear Armageddon launched from Iran, doesn't that mean that this is the kind of case where the military planner, using your calculus, would likely accept broad casualties of the civilian population?

NEWTON: Well the international court of justice who is adjudicating exactly that issue, refuse to make a categorical bright line rule and this is why it is so hard? This is why we have radio shows to talk about this, right? Clear cut bright line rules you put on a 3 x 5 card. You are allowed to use an international law, the necessary amount of force to eliminate the threat. Once you are into a conflict, the same term 'proportionality' has a very, very different meaning. It simply means, as Milena was alluding to, the balance between the military value and the larger damage to civilian lives or civilian property. It is a very different concept. The point is that once you have begun conflict, the use of permissible force is not keyed to what you see in front of you. We are talking on the front end of that.

SCHARF: So I am picturing this Israeli attack may be coming in the summer. Many civilians dying, lots of destruction and maybe successfully getting rid of all the nukes, maybe just setting them back a little bit. What is the likely reaction of the international community? Now, Mike, you suggested that there would be people secretly clapping against Iran and capitals, but Shannon what do you think would be the public reaction?

FRENCH: Well it won't be uniform that's for certain, but I think the key here is last resort, and that is going to be whether or not people are persuaded

that in fact that it was at that point of last resort. The burden is going to be on Israel to prove a counterfactual. They are going to have to prove that if we had not done this, this worse result would have not occurred and that is incredibly hard thing to prove without having to show people, no this is what would have happened—I am skeptical. I think the results would not pass the reasonable person test with everyone internationally.

SCHARF: Well, everyone is going to have to make that decision for themselves and I think we are all going to have to hold our breath to see how this plays out in a couple of months. Unfortunately, we are just about out of time. We have been looking at some really scary issues today, but we hope that we have been able to shed some light before there was only heated debate. All of us will have a chance to weigh in during this election year. Thanks for joining us and thank you to our guests: Mike Newton of Vanderbilt Law School, Shannon French of the Inamori Center at Case Western Reserve University, Milena Sterio at Cleveland State University, and Paul Williams at the Public International Law and Policy Group from Washington, DC. This is Michael Scharf. Thank you for joining us.

Talking Foreign Policy, May 24, 2012 broadcast

Participants:

Michael Scharf

David Crane

Shannon French

Milena Sterio

Paul Williams

SCHARF: The U.S. Attorney General recently gave a controversial speech justifying assassination of Americans abroad. Meanwhile, despite the International Criminal Courts arrest warrants, indicted war criminals like al-Bashir of the Sudan remain on the loose. And just a few weeks ago, President Obama and Afghan President Karzai shook hands on a plan that critics are comparing to Vietnam. When you hear about international events like these do you ever wish you had access to a group of foreign policy experts who could break the issues down for you and provide their unvarnished opinions? Well, that is what we provide on *Talking Foreign Policy*. I am your host, Michael Scharf. Our expert panel today consists of an international prosecutor, a peace negotiator, a military ethicist and an international law professor. We will be discussing these topics after the news.

SCHARF: Welcome back to *Talking Foreign Policy*. I am Michael Scharf, the director of the Frederick K. Cox International Law Center at Case Western Reserve University. Today, our experts will be discussing the controversial policy of targeted killing of Americans abroad. We will also be talking about the failure of bringing to justice tyrants, who are on the loose. And finally, we will be assessing America's exit strategy from Afghanistan. We are very fortunate today to have with us, from Washington, DC, a famed international prosecutor, David Crane. Dave was appointed in 2002 by the secretary general of the United Nations to be the founding prosecutor of the Special Court for Sierra Leone. Just a few weeks ago Dave got to see his courts come to fruition when they convicted former president of Liberia, Charles Taylor.³² Dave, thanks for being with us today.

32. "In a landmark ruling, an international tribunal found former Liberian President Charles Taylor guilty [April 26, 2012] of aiding and abetting war crimes in neighboring Sierra Leone's notoriously brutal civil war. It was the first war crimes conviction of a former head of state by an international court since the Nuremberg trials of Nazi leaders after World War II," Faith Karimi and Moni Basu, "Court Finds Charles Taylor Guilty of Aiding War Crimes," *CNN*, April 26, 2012, <http://www.cnn.com/2012/04/26/world/africa/netherlands-taylor-sentencing/>.

CRANE: It is a pleasure to be here, Michael.

SCHARF: So Dave, I understand that with you across the table in Washington, DC, is Paul Williams. Paul is from the Public International Law and Policy Group. He is a professor at American University. He has been with us before and it is great to have you back.

WILLIAMS: Thanks Michael, it is great to be here today.

SCHARF: Here in our studio, we have Shannon French who is the director of the Inamori International Center for excellence at Case Western Reserve. She came to Cleveland a few years ago from Annapolis where she was a professor at the Naval Academy. Good to have you here.

FRENCH: Great to be here, Michael.

SCHARF: Then our final expert is Milena Sterio, who is a professor of international law at the Cleveland Marshall College of Law.

STERIO: I am happy to be here, Michael.

SCHARF: We are all here together, ready to talk about some really controversial issues in international law. The last time we did one of these broadcasts,³³ we were having a spirited debate about the use of predator drones, which are these flying robots that are being used in Afghanistan and Pakistan and killing our enemies in the battlefield. Today, we are going to be talking about something even more controversial. We have just recently learned that these predator drones are now targeting Americans. Let me start with you, Dave. Dave, for thirty years, you were a lawyer in the department of defense in the army. So I think you have a really good sense of what is legal and what is not on the battlefield. The Obama Administration has now acknowledged that we're basically assassinating Americans abroad and that there is a hit list of U.S. citizens involved in al-Qaeda.³⁴ Doesn't that violate the international and U.S. prohibition on assassinations?

CRANE: Yes it does; and justices aside, not only was I a lawyer during those thirty years in the federal government, but I also was a special operations officer and a senior intelligence officer. Some of my clients, when I was a

33. Broadcast from March 1, 2012. (To hear recording of broadcast, see YouTube, *Talking Foreign Policy*, <http://www.youtube.com/watch?v=PUvFvowWZmc&feature=youtu.be>).

34. Shortly after the attacks on New York and Washington, DC, on September 11, 2001, the United States began its attempt to dismantle al-Qaeda as part of its global war on terror. The 9/11 Commission Report affirmed the attacks were driven by Osama Bin Ladin, a founder of al-Qaeda. (2004 WL 1846272, U.S. Senate).

judge advocate and a general counsel, were very special operations organizations that were very much on the pointed end of the spear. I am very much knowledgeable as to the parameters of how we can use very precise instruments such as special operations. To answer your question, the policy of the United States is we do not assassinate people under executive order 12333.³⁵ We only, for military necessary purposes, target lawful military targets; and if by chance we have another target that is going to be taken out by other assets within our national security apparatus, then the president can issue a special finding to allow that to happen. But then again, under the national security act of 1947,³⁶ he has to notify Congress to that affect.

SCHARF: So I guess that is the issue. We cannot assassinate people but we can engage them militarily. So let me ask you Paul, when you sat back and heard the attorney general give his speech where he was justifying the context in the situations when we can kill Americans abroad,³⁷ what were his justifications? What were his parameters?

WILLIAMS: Well Michael, there is three important parameters that emerged from Attorney General Eric Holder's presentation a few months back. The first is that it seems that the administration has found a legal basis for determining that the executive branch, quite frankly, can be the judge, jury, and executioner of American citizens abroad if they find it necessary to do so and there is an imminent threat to the United States. They also very cleverly have determined that since al-Qaeda is constantly looking to strike the United States, we are constantly under this imminent threat so it is essentially complete discretion of the executive branch to execute American citizens when they believe it is necessary to do so. The second important parameter, which is interesting, is that in order to get to this decision, they have blurred the distinction between constitutional protections and law of war. Earlier in

35. Executive Order 12333, the United States intelligence activities, was enacted in December 1981, giving more power and responsibility to United States intelligence agencies. Part 2.11 contains a prohibition on assassination. National Archives, Federal Register, Executive Order 12333, accessed October 21, 2012, <http://www.archives.gov/federal-register/codification/executive-order/12333.html>.

36. 50 U.S.C.A. § 413b. Available online, Cornell University Law School, "Presidential Approval and Reporting of Covert Actions," accessed October 21, 2012, <http://www.law.cornell.edu/uscode/text/50/413b>.

37. "Attorney General Eric Holder on [March 5, 2012] presented the Obama Administration's most detailed justification for armed drone strikes against Al-Qaeda leaders, arguing that the U.S. government doesn't legally need judicial review to kill terrorist operatives overseas—even when they're Americans." John Gerstein, "Eric Holder: Targeted Killings Legal, Constitutional," *Politico*, last modified March 6, 2012, <http://www.politico.com/news/stories/0312/73634.html#ixzz29y3DqDjD>.

the previous administration it was a global war on terror. This administration has rejected that approach and sought to criminalize it. However, traditional constitutional law limits the ability to go after American terrorists abroad so they have sucked back into the law of war and in doing so they have invoked this third element, that it is permissible to have collateral damage. We have a very perverted approach here where we are mixing constitutional provisions, limiting them by the laws of war and even permitting collateral damage when we carry out an execution of an American citizen abroad.

SCHARF: Now Paul, you just mentioned the constitutional approach in the United States. Let me ask our law professor, if we compared this to a situation in the U.S. where a police officer shoots a suspect, what does the constitution require in that context and how is it different than what the attorney general is saying we can do abroad?

STERIO: Under our constitution, there is a famous Supreme Court case called *Tennessee v. Garner*³⁸ which says that a police officer can shoot a suspect only if the suspect is engaged in a dangerous felony or is armed and represents an immediate threat to the police officer.

SCHARF: So just because they are a member of the mob or narcotics organization, we cannot just go and kill them on the streets, right?

STERIO: We cannot just go and kill them on the street just because of their status or membership in an organization; that is correct.

SCHARF: Okay, so now let's talk about what is going on in the field. Last September a U.S. drone attacked, in Yemen, an American named Anwar al-Awlaki.³⁹ He was a U.S. born cleric. He was suspected of being involved in al-Qaeda and was on the hit list that Paul told us about. Travelling with him was a journalist, who was not on any hit list. Both of them were killed. What would the constitution say about that?

STERIO: The Constitution would clearly not permit an assassination or shooting of someone like al-Awlaki in these circumstances. Al-Awlaki was driving in a car with a passenger in the middle of the desert. He did not represent an immediate threat. However, let me just come back to something that Paul mentioned. Under the current Obama Administration approach,

38. *Tennessee v. Garner*, 471 U.S. 1 (1985).

39. See Bob Dreyfuss, "Assassinating Awlaki: Obama Can Kill Anyone He Wants To," *Nation*, September 30, 2011 <http://www.thenation.com/blog/163724/assassinating-awlaki-obama-can-kill-anyone-he-wants#>.

basically we have defined al-Qaeda as a group that can strike against us at any time with no notice. Basically, we sort of defined the immanency requirement so that because we consider them to be able to strike against us at any point we say well basically any threat they pose to us is imminent.

SCHARF: Okay, so al-Awlaki and his friend, the journalist, are driving on a highway in a desert and a predator drone just blows them up and they say that he was somehow an imminent threat while he was driving his car in the middle of the desert and basically they are saying that because wherever he goes at any time he is always a threat.

STERIO: That is exactly right. You could make the argument that maybe he was in the car driving to an al-Qaeda training camp or maybe he was on his way to construct a bomb that he was going to be using against the United States. But that is essentially the approach, yes.

SCHARF: And it would not matter if it was ten hours away, this training camp or the bomb site, or ten minutes away?

STERIO: Correct. Under the Obama administration the approach would not matter, immanency requirements have basically has been defined away.

SCHARF: All right. So Mr. International Prosecutor, our military expert, let's get back to you. Dave, the attorney general's answer to this conundrum is that if an American joins the enemy in a war against the United States, he basically becomes a legitimate military target, the fourth and fifth amendments no longer apply. Does this mean that only on the battlefield, only in Afghanistan and maybe Yemen,⁴⁰ this theory works or would this apply anywhere in the world where members of al-Qaeda, who happen to be U.S. citizens are located?

CRANE: I think it is a matter of prospective. If we have an American who joins the enemy and is actively engaged in combat operations against the United States, then he is a legitimate military target and can be engaged. As we peel away from Afghanistan and broaden this alleged threat around the world, let's say in Yemen, then it becomes more problematic to hook this individual in as a valid military target because we have a bright red thread in international criminal law, which I prosecuted individuals in West Africa, you do not intentionally target civilians. But for certain rare or specific exceptions

40. See Jim Lobe, "U.S. Escalating Drone War in Yemen," *IPS*, April 26, 2012, <http://www.ipsnews.net/2012/04/us-escalating-drone-war-in-yemen/>.

such as their turnaround as a Libyan mass, or begin to target you, you have a right to self-defense or they become unlawful combatants taking up arms against you. So you can target them; but in this situation it becomes a very slippery slope I am very, very concerned about. Just like assassination, we go out and execute individuals for what they may do, be they American or not. I think that is very problematic and the wrong direction where we want to take the law and military operation.

SCHARF: Currently Dave, they are saying that not just in Afghanistan, where we are actually fighting a war, or Pakistan, where the war is spilling over, but in places like Yemen and Somalia—where else are they using predator drones around the world? Where else should we be concerned about this?

CRANE: Predator drones are the wave of the future. They are relatively inexpensive, very precise—which is good because you have to be precise when you use force. I think we are reaching for them without completely thinking through their legal use and ramifications. Listeners have to understand that if the military uses a drone, they have to follow the laws of conflict, military necessity, proportionality, unnecessary suffering, and discrimination. If other national security assets use it, those rules do not apply. I think it is really important for us to lay this on the table because, again, we have a different set of rules depending on who is flying that predator.

SCHARF: And back to Paul when you were describing the attorney general's justification, you mentioned that it is the CIA that is making these decisions here. Is that right?

WILLIAMS: I think David hit on the key point here, there has been a blurring of law because there are so many characters on the U.S. government side involved in executing individuals abroad including American citizens and the administration has been simply unwilling to simply say we are in a global war on terror and the laws of war apply. They have been mixing it with constitutional provisions, and quite frankly, Michael, they have been hallowing out our constitutional protections.

SCHARF: Paul, I am not going to let you get away with dodging the exact question. I am a little bit more comfortable with what Dave is describing as having a military officer control these drones maybe in a hot battlefield situation. What I am worried about is whether the CIA has control of this. What I want you to tell me is who has got control? Should I be losing sleep over this, Paul?

WILLIAMS: Michael, you should be losing sleep over this because you are one of the few people asking this question. And when it has been asked, the U.S. government has refused to answer. There is robust oversight. It is a serious and controlled process. Trust us. We have a death list and we are killing people without constitutional provisions.

STERIO: And the CIA is doing this. Shannon, do you agree with the proposition that the war on terrorism is worldwide and we can have the CIA kill, not just foreigners, but Americans may be across the border in Mexico or Canada or anywhere else in the world?

FRENCH: Absolutely not. It was raised before and I can't emphasize this enough that this blurring of the lines, absolutely undermines all of the core values that went into the principles in the first place. For example, the just war tradition⁴¹ on which all military ethics is based is there precisely to try to limit the scope of war. When you do as the expression is used 'hollow it out' and take out all of these constraints, you are making it meaningless. You also have this problem that when they introduce a new technology, like the drones, they act like "Aha!"—it is a new technology, so that we can pretend the old rules do not apply. But, they do. I cannot say this strongly enough. The old rules, the principles that are behind the law of armed conflict,⁴² the ethics behind it, they do not alter when you come up with a clever new way to kill people. There are still some people you can, in certain ways, and certain people you can't. I will also just point out that having a CIA director have the power to kill a U.S. citizen without due process, that is incredibly dangerous and it is nothing that you can find justification for in any of the principles of the founders of this country. Also, I would like to point out that no one man should have all that power. Yes, I am quoting Kanye West⁴³ when I say that.

41. The just war tradition is the institution of rules or agreements that have historically been established to apply to war. See George R. Lucas, Jr., "'New Rules for New Wars' International Law and Just War Doctrine for Irregular War," *Case Western Reserve Journal of International Law* 43 (2011): 677 (discussing the just war tradition application to the "global war on terror").

42. The international humanitarian law, also known as the law of armed conflict, is contained in treaties and customary rules between states limiting the effect of armed conflict. See ICRC Legal Fact Sheet, "What is International Humanitarian Law?," accessed October 21, 2012, <http://www.icrc.org/eng/resources/documents/legal-fact-sheet/humanitarian-law-factsheet.htm?>

43. "No one man should have all that power," lyrics from American hip-hop singer Kanye West's lead single "Power," from his album *My Beautiful Dark Twisted Fantasy*, Roc-A-Fella Records, 2010.

WILLIAMS: Michael, I would like to jump in and agree with Shannon but take it in a slightly different direction. As Shannon has pointed out, when we have a new technology, the government sort of embraces it and thinks the old rules don't apply. But what is astounding is that the population also embraces that. For instance, 60 percent of those who identify themselves as liberals support executing American citizens abroad without due process. Only 49 percent support the death penalty after trial by jury.⁴⁴ That is astounding. Somehow, it is okay to execute American citizens by a drone without due process, but is not okay once they have been through a trial by jury.

CRANE: Let me ask a question here. Take the al-Awlaki scenario, instead of it being in Yemen, that it is on I-40 heading West just near Ashville and we find him doing the very same thing and we have got a predator drone. What happens then?

SCHARF: Relating to that—let me ask you, isn't it true that Congress just passed a law⁴⁵ that allows us to have predator drones in the United States now?

CRANE: There you go, it is just the beginning.

SCHARF: We are first going to start seeing surveillance, but who knows where it goes? Let's say it is not just al-Awlaki, let's say there is a drug bust, organized crime or something, that a predator drone happens to see. Does it have to call in the cops or can it just unleash a hell fire missile as it did against al-Awlaki in Yemen?

CRANE: Imagine this, the FBI seeking from a judge probable cause to kill because we have Awlaki on I-40 heading west.

SCHARF: Well, let us talk about the due process angle. Dave, some experts are now suggesting that there should be a special court established to decide when a targeted killing should be authorized so it is not completely in the discretion of the CIA director. What do you think of that idea?

CRANE: I think it is an excellent idea. I think we have already done it once before and we have decided to electronically surveil American citizens or U.S. persons, as the statute says, and the Foreign Intelligence Surveillance Act⁴⁶

44. See The Field Poll, "Release # 2393," September 29, 2011, p. 3, <http://field.com/fieldpollonline/subscribers/RIs2393.pdf>.

45. Passed in February 2012, the bill makes it easier for the government to use drones in the United States. S. Smithson, "Drones Over U.S. Get OK by Congress," *Washington Times*, February 7, 2012, <http://www.washingtontimes.com/news/2012/feb/7/coming-to-a-sky-near-you/?page=all>.

46. The Foreign Intelligence Surveillance Act ("FISA") was passed by Congress in 1978, establishing the Foreign Intelligence Surveillance Court and laying out the procedure for

back in 1978–79. It was a compromise. The executive branch said we have got to have this capability to protect the country and Congress agreed, but said, we will compromise and let you have that authority, but we want to have our third branch of government, the judiciary, take a look at it to make sure that the constitution is not violated. So, I think we have a precedent. I think if we are going to go down this road, then I think we are going to need to have something like this or give the Foreign Intelligence Surveillance Act courts more power to review this. The system is already in place.

SCHARF: Let me ask Milena this, isn't it true that in all but one case out of thousands filed, this Foreign Intelligence Surveillance Act court has always approved the wiretap warrants?

STERIO: Yes, Michael that is correct. However, if you think about it, you could argue that the court here, the FISA court, does act as a barrier in a sense that only the well-written justified applications are submitted to the court. The fact that we have a court prevents anybody from submitting a frivolous application to the courts. So even if most of those requests have been approved, what about the thousands of requests that have never been filed? I agree with David that some sort of a judicial oversight is necessary because when the executive acts as prosecutor or judge, jury and, executioner in secret regarding the targeting of American citizens that is a very scary thought.

FRENCH: Well, there is a difference between wiretapping and killing someone. I would like to think that if there is (what you are talking about) a bit of a pause before even submitting a request for some wiretapping, there would be an even greater one before saying review this for permission to kill.

STERIO: Absolutely.

CRANE: I think that is an important point to bring up. I do not know the exact statistics. I used to write those and move those around for the Department of Defense on a particular issue. But the attorney general of the United States has to personally certify to the foreign intelligence surveillance court that there is probable cause to surveil you as a person. So the standard is so rigorous and the process is so reviewed by general counsels and judge advocates before it even goes to the attorney general; the point was well made here just now. I think it is important for your listeners to understand that

requesting judicial authorization for surveillance and collection of foreign intelligence information. It can be found online at <http://www.law.cornell.edu/uscode/text/50/chapter-36> (accessed October 21, 2012).

they do not all actually go through the court because there is not enough probable cause. So I think that it would work. It is better than nothing.

SCHARF: Is there any proponent of this? Is anybody suggesting this on either side of the aisle?

CRANE: I just had a very bright student write about it in one of my papers which I just graded. It was simplistic, but yet perfect. You hear it in the academy and among practitioners over cocktails, but in reality, I personally know of nothing being formalized at the legislative level or being kicked around at the Departments of Defense or Justice.

WILLIAMS: This is what is sort of shocking. There is a weak accountability debate. When the war on terror was launched and drones were initially used, there was a fierce debate in the public and the media about whether we should be doing this. That debate no longer exists. For some of reason, as Shannon mentioned earlier, it is some new flashy technology, it has been embraced by the government and that is fine, but it also has been embraced by the general public and by the self-proclaimed watchdogs that are supposed to constantly challenge this type of activity. But there is deafening silence from the civil rights community, the civil libertarians. Quite frankly, Michael, it is stunning.

SCHARF: While we ponder the specter of the stunning robotic killing machines flying over our streets in the United States and abroad, let's take a short break and when we return, we will be discussing some of the challenges of bringing some of the world's most terrible tyrants to justice.

SCHARF: Welcome Back. So we have been having a really, really entertaining discussion that went way too long, but could not stop it discussing the legalities, pros and cons of targeted killings of Americans abroad. In our second segment today, we are going to be talking about the failed efforts to bring some notable tyrants to trial. David, I want to start with you. It is really amazing that we have you on this show, especially with this topic. A few weeks ago you were sitting in the courtroom when former leader of Liberia, Charles Taylor, was convicted by the special court for Sierra Leone. Dave, as the founding chief prosecutor of that tribunal, you were responsible for the indictment of Taylor back in 2003 and I understand that was somewhat controversial. What was your thinking at the time?

CRANE: As I walked through Sierra Leone and visited other parts of West Africa, I told the people of West Africa that no one is above the law and the rule of law is more powerful than the rule of the gun. I told them don't believe

what I say, believe what I do. So when I decided to unseal the indictment of Charles Taylor, which I signed on the third of March of 2003, and then sealed it in June of 2003, my intent was to show the people of Africa that no one is above the law. So I wanted to bring down intentionally, Charles Taylor, before the world and let people know that the rule of law is more powerful than the rule of the gun.

SCHARF: And would you say that that was the signal that was sent two weeks ago?

CRANE: I think it was and, again, this is not about anybody but the people of Sierra Leone and I think that they now believe that the rule of law is more powerful than the rule of the gun.

SCHARF: But it sort of is about other populations as well because isn't it true that people like al-Bashir, the indicted leader of Sudan, are sort of looking over their shoulder and are sleeping a little bit less comfortably now?

CRANE: Indeed, but again at the end of the day, modern international criminal law is the bright red thread throughout all this. It is politics. We have the ability to prosecute. We have the rules, the procedure, the jurisprudence; it's going to be a political decision to hand over any head of state whether it be Charles Taylor, Melodich, Milošević, or Omar al-Bashir. So someday, someone is going to make the political decision to hand him over to the international criminal court.

SCHARF: Now Shannon, you taught for years and years at the Naval Academy. When you think about international prosecutions of these leaders, I am sure many people argue that it is important for deterrence to deter future war crimes. Is there empirical data or is there any evidence that there is any kind of deterrence?

FRENCH: I hate to say this, but the answer is no. There may come to be some level of deterrence, maybe it is a cumulative effect and the more that there is regularity and you can get a consistency of certain punishments coming down for these tyrants maybe there might come to be one. But the trouble is that you are dealing with people who are already risking their lives in the sense that they are obviously not making fans in the places where they are doing their war crimes and they risk getting killed if they lose power.

SCHARF: There must be something about being a tyrant where they are cost benefit analysis is not the same as an ordinary person.

FRENCH: Right, you are already dealing with people who are off the rail. So is the fact that, hey, you might be called in front of the Hague, really going to stop someone who already thinks it is okay to do the things that they are doing?

SCHARF: But someone like al-Bashir of the Sudan who has been indicted now for five years can continue to thumb their nose at international justice. Doesn't that send sort of an opposite signal? Doesn't it sort of say that you can get away with it?

FRENCH: Yes, I think it is more important from the justice perspective than from the deterrence perspective in the sense of what it says to the victims, what it says to the people who are judging the international community's resolve on questions like this, which is where it matters. But I am not convinced that anybody who was about to commit genocide goes, oh wait, I may get hauled in front of the international court.

SCHARF: Now speaking of Al-Bashir, let me bring Paul Williams into this conversation. Paul you were a peace negotiator between the Sudan and Southern Sudan. You were an arbitrator in the arbitration between those two countries. You know the situation in the Sudan. Tell us about Al-Bashir. What was he accused of and why is it important to bring him to justice?

WILLIAMS: What is so stunning about the continued existence of President Al-Bashir in power as the President of Sudan is as you said, over five years ago he was indicted by the international tribunal for genocide in Darfur.⁴⁷ That has not stopped a whole host of international envoys going to his door and trying to negotiate peace with him both in Darfur and now with the conflict in a place called Southern Kordofan in Blue Nile.⁴⁸ As David had mentioned, the rule of law is more powerful than the gun, but it is not entirely clear that the rule of law is more powerful than the political predisposition to accommodate and appease those individuals. Shannon mentioned that it might not change their mind, but quite frankly, it certainly should change the mind of the international community trying to negotiate peace deals or bring about peace. There is this delusion that you can dance with the devil and not get burnt, and I think that is the lesson that we have to start taking seriously and learning from when dealing with individuals indicted for war crimes.

47. Mai-Linh K. Hong, "A Genocide By Any Other Name: Language, Law, and the Response to Darfur," *Virginia Journal of International Law* 49 (2008): 235–41.

48. "Sudan: Crisis Conditions in Southern Kordofan," *Human Rights Watch*, May 4, 2012, <http://www.hrw.org/news/2012/05/04/sudan-crisis-conditions-southern-kordofan>.

SCHARF: Milena, Paul just mentioned that people are going to the Sudan. I guess they want Al-Bashir's oil, so you have diplomats going there, but he is just not hanging out in the Sudan, he is hopscotching all around Africa and nobody is arresting him. Don't they have an international law obligation to arrest him and send him to the Hague?

STERIO: Sure. Al-Bashir certainly is not travelling to places like France, England, and Italy, but he has been traveling around the African continent.⁴⁹ Other African states have been claiming that Al-Bashir has what is called 'head of state immunity,' which is an important principle and rule of international law.⁵⁰ So the question here is whether an outstanding warrant by the International Criminal Court trumps the principle of head of state immunity? There is a lot of argument to be said that yes, it does. Especially in this kind of situation where the International Criminal Court is actually investigating in Sudan because the situation was referred to the court by the UN Security Council.⁵¹ So that arguably trumps any head of state immunity. However, African countries basically say that they are going to go to the international court of justice to ask for an advisory opinion before they decide what they are going to do.

SCHARF: David, let me turn back to you. I know you have been doing work on this issue. The countries of Africa are kind of losing their excitement about the International Criminal Court. They are becoming disenchanted and part of the reason is the situation involving their fellow head of state, Al-Bashir. What do you make of all that?

CRANE: Well again, I think it's wrong to think that the ICC is focusing on Africa, but I think that Africa is symptomatic of an attitude that is starting to permeate the court, and that is a bit of arrogance. From their perspective, they believe that they are the permanent international court that deals with these things. I think they have lost sight of the fact that they are a court of last resort and there is a great difference to the opinions and perspective of any country state's party as to how they would like to deal with the situation.

49. "Ethiopia to Host African Union Summit After Omar al-Bashir Malawi Row," *BBC*, June 12, 2012, <http://www.bbc.co.uk/news/world-africa-18407396>.

50. "Bringing Power to Justice: Absence of Immunity for Heads of State Before the International Criminal Court," *Amnesty International*, last modified December 1, 2010, <http://www.amnesty.org/en/library/asset/IOR53/017/2010/en/9dd7f7ce-d531-486b-abe0-d873ad57287a/ior530172010en.html>.

51. Sarah M. H. Nouwen and Wouter G. Werner, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan," *European Journal of International Law* 21 (2010): 941, 954-62.

I think that is a critical thing for us to consider because I think they have lost that perspective.

SCHARF: Well, speaking of a court of last resort, another situation involving the International Criminal court of last resort is Libya. They have indicted Muammar Gaddafi's son, Saif Gaddafi, and Libya says no, we want to prosecute him.⁵² So Dave, why can't Libya prosecute him? Or Paul, what is your take on that?

WILLIAMS: Michael, let me pick up on that because I think this is an important lesson. We are learning an important lesson from Libya which answers the question you asked earlier about the African union and head of state immunity. The people of Libya are hugely in favor of accountability and justice. That is why they want to see Saif Gaddafi, the son of Muammar Gaddafi, prosecuted. They want to see him prosecuted in Libya because that is where he committed his crimes and it is important as far as the healing process. What we learn here is that the people of Africa are quite keen on justice. You hear a lot about the African Union not being interested in the ICC work or justice in Africa anymore and them being unfairly targeted. As Milena points out, they pick, oddly enough, head of state immunity because they are worried about themselves. Mike, a recent poll showed that 77 percent of Kenyans support justice mechanisms. 71 percent of Nigerians support these justice mechanisms and about 90–95 percent of the Libyans support these. So the people of Africa are very much behind this idea of accountability. It is just that the leadership is not quite as enthusiastic about that.

SCHARF: Shannon, I am going to let you have the last word on this.

FRENCH: I was just going to say that justice requires consistency and we, the U.S., but also the international community have been accused of inconsistency in places where we intervene and where we fail to do so. If there is inconsistency in terms of whom we haul before the court and who we still try to make deals with, we are just reinforcing the idea that it is not justice for all. That is a significant thing.

SCHARF: All right, it is time for another break. When we come back our experts are going to provide a critique of America's exit strategy from Afghanistan. Stay with us.

52. Bruno Waterfield, "International Prosecutors Back Demand Saif Gaddafi Stands Trial in Libya," *The Telegraph*, October 9, 2012, <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/9597086/International-prosecutors-back-demand-Saif-Gaddafi-stands-trial-in-Libya.html>.

SCHARF: We are back with *Talking Foreign Policy*. So we have been debating the policy of targeted killings of Americans abroad. We had a brief discussion of what to do about bringing tyrants to justice and in our final segment we are going to spend some time talking about Americas newly penned exit strategy from Afghanistan. David, I want to start with you. You spent 30 years in the military. To date, 1,900 American troops have died in the war in Afghanistan. There have even been 432 casualties from Ohio, where we are broadcasting from today. As a former special ops officer, a paratrooper and a senior executive in the DOD for 30 years, can you tell us why the United States has over 100,000 combat troops in Afghanistan? What are we doing there?

CRANE: I think we are there in fact to stabilize Afghanistan. We have already defeated Al Qaeda in Afghanistan and we have a challenge in Pakistan as well. The combat troops that are there are necessary for us to achieve our military objectives as we transition from a military operation to counter insurgency and then to essentially building a new country called Afghanistan. None of this happens in sequence A+B+C. There is blending and steps: one step forward and two steps back at times. You need the stability of combat troops not only to take on whatever threat it may be, but also to ensure they do not attack again until it is time for us to hand over the ability for the Afghan army and the Afghan police to keep Afghanistan stable.

SCHARF: Ten years ago when we determined that the Afghan government of the Taliban was partly responsible together with Al Qaeda in the attacks of 9/11, we attacked. We toppled the Taliban and they went into hiding. We have been there and you say we have been doing some nation building and we are trying to do counterinsurgency.⁵³ Are we winning? What are the measures of success here, Dave?

CRANE: In these situations, I have to tell you I honestly do not think that we are winning. There is no such thing as winning in situations like this. I started my public service career during the Vietnam era in a very interesting war. It is going to be up to the Afghan people as to what they want to do regardless of how hard we work to do it. I am certainly not belittling the sacrifice of American citizens, wherever they may be. That is not what I am saying. All I am saying is we have to be very careful in our objectives in what I call dirty little wars, and I think we have been there a bit too long. It is faded and at this point and time, we are not winning the war because we do not know what that is. But the Afghan people will eventually in the next couple of years.

53. Afghanistan, *New York Times* World News, last modified October 2, 2012, <http://topics.nytimes.com/top/news/international/countriesandterritories/afghanistan/index.html>.

SCHARF: So Shannon, David says maybe we are not winning. But if you read the newspaper account, the administration says we are doing just fine; we are making progress. What are the metrics that they are using?

FRENCH: You have heard them use some metrics that worry people because they reminiscent of the Vietnam War. We just heard the reference to that, in that they are talking about body counts.⁵⁴ However there is a difference and I think it is important difference in that when they do talk about having killed specific people it is named people within the Al Qaeda organization or in some cases Taliban leaders. It is not this really disturbing account that happened in the Vietnam War where they were simply tallying up numbers of dead on the other side and in some cases even blurring the line between whether they were civilian dead or combatant dead. So I think it is unfair to make the correlation that strong, and I would also point out from a just war tradition perspective that the war in Afghanistan has a much stronger reason to be there in the first place then say, Iraq did. But now all this time has gone by, do we still have a reason to be there? Are there better ways that we can do this moving forward?

SCHARF: We should be suspicious of the metrics that we hear the administration using. At the same time a few months ago, Afghanistan's people were outraged when U.S. soldiers burned copies of the Koran at a NATO base.⁵⁵ Then a couple of months ago, a U.S. officer went berserk. He went door to door on a shooting spree and killed sixteen civilians, including nine children.⁵⁶ There have been countless cases in the news where our predator drones, from our first segment, have killed a lot of innocent civilians that are collateral damage or maybe in mistaken airstrikes.⁵⁷ So are we losing the effort to win the hearts and minds in Afghanistan?

FRENCH: Well, I think that is one of those yes and no kind of questions. On the one hand you are absolutely right and a lot of this has led to what they

54. Mark Thompson, "Should the Military Return to Counting Bodies?," *Time*, June 2, 2009, <http://www.time.com/time/nation/article/0,8599,1902274,00.html>.

55. Kevin Sieff, "U.S. Probe of Koran Burning Finds 5 Troops Responsible, Officials Say; Afghans Demand Trial," *Washington Post*, March 2, 2012, http://www.washingtonpost.com/world/us-probe-of-koran-burning-finds-5-soldiers-responsible-afghan-clerics-demand-public-trial/2012/03/02/gIQAwwJqYmR_story.html.

56. Ahmed Nadem and Ahmed Haroon, "Sixteen Afghan Civilians Killed in Rogue U.S. Attack," *Reuters*, March 11, 2012, <http://www.reuters.com/article/2012/03/11/us-afghanistan-civilians-idUSBRE82A02V20120311>.

57. United Nations Assistance Missions in Afghanistan, "Afghanistan: Annual Report 2011, Protection of Civilians in Armed Conflict," February 2012, http://unama.unmissions.org/Portals/UNAMA/Documents/UNAMA%20POC%202011%20Report_Final_Feb%202012.pdf.

call green on blue violence, meaning that some of the folks we are trying to train are partnering with, in Afghanistan some of the troops are attacking U.S. troops.⁵⁸ So obviously that is disturbing. It does not suggest that we are winning over the people in the country. At the same time, though, there isn't the urge to push us out immediately, at least in the kind of dramatic draw down that some folks would like to see; like us literally pulling everyone out immediately because there still is a reliance and there is an understanding that if we left immediately that people are not trained to replace the U.S. troops.

SCHARF: Well, the Afghan president, Hamid Karzai, certainly wants us to stay there. Let's talk about him for a minute. He is seen as corrupt. He is unpopular.⁵⁹

FRENCH: That is because he is corrupt, Michael.

SCHARF: He is seen as contemptuous of the United States.

FRENCH: Some of the contemptuousness of the U.S. is playing to his domestic audience there and he has to, particularly when these horrible things happen. We have had these atrocities on our side, so of course he cannot turn around and say I love the U.S. after that happened.

SCHARF: But we have hitched our horse to his wagon, right?

FRENCH: There is no other horse.

SCHARF: What are the implications of that if we are taking our destiny and linking it with his?

FRENCH: I do think it is worrisome. I am not going to belittle that, but at the same time I think everyone understands that there is no other horse and that we are not linked so much to him as we are trying desperately to find some kind of stability in leadership. If a new leader came along that we had more confidence in, I don't think anyone expects that we would not ditch Karzai for this new and better prospect.

SCHARF: Now Paul, you have been in almost every war zone around the world, but I don't think you have been to Afghanistan yet, is that right?

WILLIAMS: No, and not any time soon.

58. Tucker Reals, "Afghanistan Police Officer Kills 2 U.S. Troops in Latest Green-On-Blue Attack," *CBS News*, August 18, 2012, http://www.cbsnews.com/8301-202_162-57495151/afghanistan-police-officer-kills-2-u-s-troops-in-latest-green-on-blue-attack/.

59. Skip Kaltenheuser, "Afghanistan: The Long Goodbye, Leaving A Failed State Crippled by Corruption," *IBA Global Insight* 66 (2012): 14–17.

SCHARF: Okay, so let's get you there in spirit anyway. With Osama Bin Laden dead and the Taliban ousted, is it still in American's vital interest to fight on in Afghanistan? Why not just pull out now?

WILLIAMS: Actually, Michael, you have hit on this. We have a very serious problem with our policy in Afghanistan and that is that we are delusional. We have lost this war and we are unwilling to admit it and, thereby, we are creating policies and commitments for the next decade that are going to tie us to this sinking stone. The military has done its job. They hunted down Osama Bin Laden and they shot him dead. They have pushed the Taliban out of the most important areas, they have cleared and they have held territory, and then they turn around and say, okay, we have cleared and we have held territory, let's get the Afghan security forces. As Shannon pointed out, there is just as much likelihood as green on blue violence as there is on actually holding territory from the Afghan forces' side. Politically, we have massively let down the people of Afghanistan and our military people who are in there fighting the battle. There was a recent interview on NPR, where a senior American official was asked the question, "What happens when all this international aid that is currently going to the country as part of the war effort, pulls out? Won't the bubble collapse?" And no kidding, he said "No, it won't because most of the money has been taken out as legitimate profits by international contractors or it has been brought out in suitcases of cash to points beyond Afghanistan. So the Afghans won't actually notice when the economic bubble supported by the war effort disappears." What kind of policy, what kind of strategy is that?

SCHARF: David, you used to teach at the judge advocate general school, you are a student of military history, and perhaps you have a different take on this. If we rapidly pulled out of Afghanistan what would be the risks?

CRANE: We are stuck. We are in it and we have to deal with it. I agree with my colleagues. We have got issues. We can't pull out. This has not been thought through completely. I agree with Paul. We have accomplished the military mission and now we just cannot pull out because it would be catastrophic. It would mean a weakened Pakistan. What we are really talking about here is Afghanistan/Pakistan or as they say over there in that part of the world 'Afpak.' That is how they are approaching it now because you have to. So if we have to pull out, it would be a sucking chest wound and there would be a black hole. Then we will start this all over again because someone is going to have to step in. We are in this. We will have to quote Richard Nixon as we pulled out of Vietnam, "We need peace with honor."

SCHARF: Well Milena, speaking of peace with honor, the president was just in Afghanistan, somewhere that Paul won't go. He made a deal with Karzai, a long-term strategic partnership agreement.⁶⁰ Can you tell us what the different provisions of that agreement are?

STERIO: The president recently just travelled to Afghanistan. It was a secret trip, unannounced for security reasons and, while over there, the president signed a pact with President Karzai. In the pact the United States promises to reduce troop levels of American soldiers in Afghanistan to sixty-eight thousand from one hundred thousand this fall. Then most American combat troops are to depart from Afghanistan by 2014. However, with all that said, the United States has pledged to keep military advisors, trainers, riot police, etc. in Afghanistan for as long as another decade. We also said we will no longer have any U.S. military bases, but we will use Afghan military bases over there. So that leaves the door open for the United States to use Afghanistan for continued drone strikes on the Taliban or Al Qaeda forces in Afghanistan or possibly Pakistan for as long as another decade. We actually will be there in somewhat reduced numbers, but we will still be there.

SCHARF: All right Paul, you have done twenty-four peace negotiations, help us break this down. What are the criticisms of this agreement? What should we be worried about?

WILLIAMS: The criticisms of this agreement are essentially that it is not an agreement. The obligations on the Afghan side are to fight corruption and Shannon can tell you why that is not going to happen. Then they commit us to pay the salaries of the Afghan security forces. David is right. We are stuck with this. We are swimming in a race with a stone tied around our waist. But we have to acknowledge that and embrace that and then craft a policy around that. Simply funding the Afghan defensive forces billions of dollars into the indefinite future is not a policy. We think we are winning, we're following the Afghanization approach, we turn to the Afghans because it has been successful; we have cleared, we have held. But we cannot just pump billions of dollars into the Afghan security forces and cross our fingers. We have to realize that we are stuck with a very difficult situation. We have to be more clear-eyed and, quite frankly, more realistic about how we approach the situation in both Afghanistan and Pakistan.

60. White House, "Enduring Strategy Partnership Agreement Between the United States of America and the Islamic Republic of Afghanistan," May 2, 2012, <http://www.whitehouse.gov/sites/default/files/2012.06.01u.s.-afghanistanspassignedtext.pdf>.

CRANE: The Vietnam War ended with Northeast tanks crashing through the presidential palace gates. We certainly do not want to see Taliban tanks crashing through presidential gates of Hamid Karzai's palace.

SCHARF: Let's say this worst-case scenario is what we see. Does that mean a return of Al Qaeda? Does that mean we will lose the war on terror, Dave?

CRANE: No, I do not think so. Again, it is going to be up to the Afghan people as to how they want to be governed, if they have ever been governed, and that is the problem. We have to look back at history, speaking of military history. No one has ever actually turned Afghanistan into the country that we would all like to see it. Quite frankly, that is not what the Afghan people want anyway.

FRENCH: Can I just say, Michael, if Alexander the Great could not conquer a place, probably no one can.

SCHARF: Is there any possibility, then, Shannon that we can see a deal with the Taliban? If they are not the same as Al Qaeda, can they be rehabilitated? Can we join with them for the good of the country?

FRENCH: Possibly, temporarily if our interests align. I think that is about as cautious as I want to put it. But I think it is important to make a distinction between the Taliban and Al Qaeda because it is a question of huge difference between domestic concerns and a larger international strategy.

SCHARF: Milena?

STERIO: On the other hand, aligning ourselves with a regime like the Taliban basically is counter to all of the human rights obligations and principles that we believe in as a country.

FRENCH: So is that realistic? Would they ever agree to human rights points enough for us?

SCHARF: And are they the Taliban that they were ten years ago?

STERIO: Who knows if they are the same people. Probably some of them are still the same. The problem is, as they pointed out earlier, that Afghanistan has basically been a war zone for a long time, and before that the Soviets were in for ten years, and before that it was pretty much civil war and chaos. Nobody really knows who is aligned with whom. The other thing is that there is not really any unity in Afghanistan. There are all these huge tribal areas where the different tribes just govern themselves. It is extremely difficult to say who we can align ourselves with or what we can do there.

FRENCH: You cannot use western principles when dealing with the tribes.

SCHARF: Explain that to our listeners.

FRENCH: Well, it is just the idea that we are treating a nation state like a unified sovereign power and it isn't. There are a series of tribes in many cases that have more of a bond with people over what we see as borders, than otherwise.⁶¹

SCHARF: All right, but when we left Vietnam it took a big toll on Americans; on its foreign policy, on its interest run in the world. If we are seen as losing and abandoning Afghanistan, what are the implications worldwide, Dave?

CRANE: Well, I do not think that I agree with Paul. If we are just honest with the American people and the world and say here is where we stand and here is our plan and where we are going, it is not a defeat. It is a political circumstance that we must face and we must make the best of it. We do not have to pull away from that part of the world. We just need to make sure we work with partners in the area to at least keep that particular group of clans stable enough that we don't see Al Qaeda or the Taliban come back in. Quite frankly, I do not think Al Qaeda is going to stick around that area. They are moving southwest toward Yemen and Somalia.⁶² I think that is our next major area that we need to be concerned about is Yemen. I think that Al Qaeda has realized that this is just not going to happen there. They do not need to be there, nor do we.

SCHARF: Paul, let me ask you this. You have been talking about polls all day. In 2009, opinion polls in the U.S. showed that 56 percent of the American people felt the Afghan war was worth fighting. Now we have had polls the last couple of months that have shown that the number of Americans who support the war has sunk to only 35 percent.⁶³ Is this going to be a major campaign issue in the presidential election? Do people care about the outcome of this?

61. Ruhullah Khapalwak and David Rhode, "A Look at America's New Hope: The Afghan Tribes," *New York Times*, January 30, 2010, <http://www.nytimes.com/2010/01/31/weekinreview/13rohde.html>.

62. Peter Baker, "Obama Acknowledges U.S. is Fighting Groups Tied to Al Qaeda in Somalia and Yemen," *New York Times*, June 15, 2012, http://www.nytimes.com/2012/06/16/world/obama-admits-us-fight-of-al-qaeda-has-extended-to-somalia-and-yemen.html?_r=1&gwh=8BE8252293F7D01A5F51352BC51C88DA.

63. Lucy Madison, "Poll: Support for War in Afghanistan Hits All-Time Low," *CBS News*, March 26, 2012, http://www.cbsnews.com/8301-503544_162-57404807-503544/poll-support-for-war-in-afghanistan-hits-all-time-low/.

WILLIAMS: Yes, I think of course this is going to be a major campaign issue and in fact, because it is a campaign issue, it is going to contribute to our delusional approach to Afghanistan. The president doubled down on Afghanistan. It was at a point and time when he first came in that he could have picked a different path, but for whatever reason he doubled down and decided to fight this war and now he has lost this war. But he cannot say that, so he is going to have to pretend he has won it. Of course, Mitt Romney is going to make the argument that the president doubled down and lost the war and now cannot find a way; a clear-eyed way to deal with it. I think what the Americans are realizing a little bit quicker than some of our government officials that we are not stuck in the Cold War. You do not lay out a map and then color code all the countries blue or red, us or them. It is much, much more complicated than that. Afghanistan, four years from now, is going to be a hybrid with territories controlled by the Taliban and other territories within Afghanistan will be controlled by other groups. It is going to be highly complicated. We should be thinking about how we manage our relationship with that intensely complicated and volatile country and not pretending that we are going to pump thousands of dollars in to the National Guard and hope it stays in the blue category and does not go to the red category.

CRANE: Success is a regional approach. We should look at the area regionally. Look at the Indian Ocean as a lake with a whole bunch of partners around it and look at that way. Afghanistan is a small part of it versus focusing all our energy just on Afghanistan.

SCHARF: Shannon, once again the last word on this?

FRENCH: I am just going to say, I do not think it is going to be a major campaign issue and that is because domestically the trouble is that people lost interest after Bin Laden was killed. That is a problem for many other reasons, but I do not think it is going to be a major campaign issue. I think the focus is going to be on the economy and that some of these subtleties are going to be lost. Michael, well, I do not want to bet on the air, but I think I would bet against you if I were.

SCHARF: Today, we have been looking at three very thought-provoking issues ripped right from the headlines; CIA assassinations of Americans using predator drones, indicted tyrants that are still on the loose and now America's Afghan exit strategy. We hope that some of our conversation has shed some light where before there was only heated debate. If you want to weigh in on

this discussion or suggest a topic for an upcoming broadcast, please send an email to: talkingforeignpolicy@case.edu. That is talkingforeignpolicy@case.edu. Thank you again to our panel of experts, former international prosecutor David Crane, President of the Public and International Policy Group, Paul Williams—both in Washington, DC, and also our experts in studio—Director of Case Western’s Inamori Center, Shannon French and Cleveland State Law Professor, Milena Sterio. I am Michael Scharf, Director of Case Western Reserve’s Cox International Law Center. *Talking Foreign Policy* has been brought to you by Case Western Reserve University in partnership with WCPN 90.3 Ideastream.

Talking Foreign Policy—September 27, 2012

Participants:

Michael Scharf

Jack Goldsmith

Baher Azmy

Milena Sterio

Mike Newton

SCHARF: The Roman philosopher Cicero famously declared that in times of war the law falls silent. In his classic novel *1984*, George Orwell envisioned a future in which the government claims to be in constant war in order to justify repressive measures against its own population. Are there parallels to post-9/11 America? With the presidential election just a month away, in today's broadcast of *Talking Foreign Policy*, our expert panel will be discussing the timely question of presidential power in a war without end. I'm your host, Michael Scharf. We'll begin our conversation with Jack Goldsmith, who had been assistant Attorney General in charge of the Office of Legal Counsel during the Bush administration. He's the author of the new book, *Power and Constraint: The Accountable Presidency After 9/11*. But first the news.

SCHARF: Welcome back to *Talking Foreign Policy*, produced by Case Western Reserve University and WCPN 90.3 FM Ideastream. I'm your host, Michael Scharf, the Associate Dean for Global Legal Studies at Case Western Law School. I'm talking today with Jack Goldsmith, the author of the new book, *Power and Constraint: the Accountable Presidency After 9/11*. Jack, thanks for being with us today.

GOLDSMITH: Thank you, Michael, for having me.

SCHARF: So, Jack, in a recent presentation on CSPAN Book TV, which I happened to catch, you said that in this endless war on terrorism you worry as much about the excess powers of the president as you do about the terrorist threat. In this regard, can you tell us what keeps you up at night?

GOLDSMITH: In terms of presidential power, the thing that keeps me up at night most, generally, is the excessive secrecy of the executive branch. It is that the executive branch secrecy bureaucracy is broader than it's ever been. Millions and millions of people have access to classified information which is illegal to disclose to the public except through very circumscribed means and the executive branch gets to determine what gets classified as secret.⁶⁴

64. Laura A. White, "The Need for Governmental Secrecy: Why the U.S. Government

And so I worry that in this endless war so much being classified and the president is determining the scope of the classification. That's what I worry about. Let me just say that the secrecy bureaucracy is more porous than it's ever been but it's also larger than it's ever been, so there are reasons to think that lots of stuff is leaking out, but there's also reasons to think that a lot of stuff isn't leaking out.

SCHARF: So when it comes to our concerns, yours are not about the warrantless wiretaps, or the assertions of extraordinary interrogation methods or black sites, or military commissions or targeted killings, it comes down for you to what they're not telling us.

GOLDSMITH: I think that the substance of almost all of our counterterrorism policies is in a pretty good place. I think the substance of the counterterrorism policies have been largely blessed by Congress and/or the courts and largely have the approval of the American people. So based on the contours of what we know about our counterterrorism programs I'm pretty satisfied. I've got quibbles at the margins. But the thing I worry about is that there's a lot we don't know and that a lot of mistakes happen in secret.

SCHARF: Now, the thesis of your new book is that the biggest surprise about President Obama is that he's actually continued President Bush's controversial counterterrorism policies without much change at all, even practices that President Obama specifically criticized in his presidential campaign. Which policies in particular do you see this as a continuation?

GOLDSMITH: There are a lot of them. The main ones are, I would say, military detention without trial, military detention, and the broad assertion of the state secrets privilege. He's continued the warrantless surveillance, which was approved by Congress in 2008,⁶⁵ but he criticized it and has continued that. He's ramped up targeted killings outside the United States from the baseline of the Bush administration, and again, this is not his fault, I think he wanted to do this, but he's failed to close Gitmo.

SCHARF: All right, so the claim of continuity is not one that the Obama supporters are too crazy about. They would like to see the Obama administration as being different from the Bush administration, in particular with

Must Be Able to Withhold Information in the Interest of International Security," *Virginia Journal of International Law* 43 (2003): 1071.

65. Eric Lichtblau, "House Approves Power for Warrantless Wiretaps," *New York Times*, September 29, 2006, <http://www.nytimes.com/2006/09/29/washington/29nsa.html>; see also Ellen Nakashima, Joby Warrick, "House Approves Wiretap Measure; White House Bill Boosts Wireless Surveillance," *Washington Post*, August 5, 2007.

respect to respect for the rule of law. So how do you explain this continuity, the fact that two different presidents of two different parties, who have such different approaches, could end up with the same policies?

GOLDSMITH: So this is one of the burdens of my book is to explain that paradox: how did two such different presidents end up in about the same place. However, there are lots of reasons for it. The main one that I argue for and that not everyone agrees with is that they ended up in the same place because there are larger structural forces outside of the preferences and inclinations of the presidents that led them to that place. So, courts and Congress, with the help of NGOs and the press, did an extraordinary job of pushing back against some of the excesses of the Bush administration; pushing him through law, through politics, through persuasion, through force, to a place that by the end of his term was a much more moderate set of counterterrorism policies and they had much firmer legal blessing. And then Obama inherited those policies and they turned out to be a lot more legitimate and when he got into office there was a lot more need for them than he had known as a candidate on the outside and then in the areas when he actually did try to push away, most notably on Guantanamo Bay and closing Guantanamo Bay⁶⁶ and having criminal trials, the very same forces that pushed back against Bush, pushing Bush to the center, pushed Obama to the center, and they didn't allow him to do that. So I think that the story of the continuity is really a story of these larger structural forces. I would call them constitutional forces pushing back against the presidents.

SCHARF: And would you add to the list of forces the lawyers on the inside; for example, yourself and the folks at the State Department Office of the Legal Advisor?

GOLDSMITH: Absolutely. A big part of the story that I tell that I didn't mention just now is not just lawyers on the inside, but all sorts of institutions that have grown up since the 1970s inside the executive branch to watch and check and vet what the executive is doing. These forces are hard to see. They're hard sometimes to convince people that they have any effect, but I think there's no doubt that they were, inspector generals, lawyers, ethics monitors, no doubt that they were consequential in watching what the president was doing and pushing back against him.

66. Carol Rosenberg, "Why Obama Can't Close Guantanamo," *Foreign Affairs*, December 14, 2011, <http://www.foreignaffairs.com/articles/136781/carol-rosenberg/why-obama-cant-close-guantanamo>.

SCHARF: And so to be clear—if you look at the Obama policies, they’re very different than the Bush administration policies in the first two years?

GOLDSMITH: Yes.

SCHARF: But very similar to the Bush administration policies in the last two years?

GOLDSMITH: That’s right.

SCHARF: Now, you were a high level Pentagon lawyer and then later the assistant attorney general in the Bush administration in charge of the Office of Legal Counsel. In your previous book, *The Terror Presidency*, you wrote that the Bush administration felt overly constrained by the law. Did President Bush succeed at all in expanding the powers of the presidency, which I know was one of his goals in the post 9/11 years?⁶⁷

GOLDSMITH: So as you say, that was certainly his goal to expand the powers of the presidency. It’s a very hard question to answer because obviously after 9/11 when there’s a war, an authorized war by Congress, there’s going to be an expansion of presidential power. But along many dimensions, I think Bush, his attempts to expand presidential power, ended up being self-defeating because some of his unnecessarily broad assertions and proclamations of executive power I think invited, worried people, and invited the pushback from Congress, the courts, the press, NGOs, and the like that led to a whole array of constraints, small and large, on the presidency now and the conduct of the War on Terror.

SCHARF: And picturing this as a pendulum that swung in the early years to the right and has swung back, are you suggesting that it’s about in the right place now, that the constraints are just about right?

GOLDSMITH: That’s not quite my claim, I try hard in the book not to make that claim and I’ll explain why. I do think that what’s happened is that we can be pretty confident that the institutions of our government and of civil society are watching the presidency closely and can push back if he goes in the wrong direction. Whether we’re in exactly the right place on counterterrorism policies I think is an impossible question to answer. We’d have to know a lot more about the threat. We’d have to know a lot more about the efficacy of various counterterrorism techniques. I don’t know personally whether the broad surveillance powers the president’s using is

67. Warren Richey, “Bush Pushed the Limits of Presidential Power,” *CSMonitor*, January 14, 2009, <http://www.csmonitor.com/USA/2009/0114/p11s01-usgn.html>.

necessary. I don't know if every single person needs to be detained at Gitmo. I don't need to know if we need a more aggressive policy. So I would say that I'm comfortable with where we are. The American people and courts and Congress seem comfortable with where we are, but I wouldn't say we've got exactly the optimal policies.

SCHARF: And when you mention that the American people are comfortable. Opinion polls have changed over the years. Some opinion polls ten years ago showed a much higher degree of discomfort with extraordinary interrogation or torture and some of the other things. The American people, according to the polls, are very much in favor of the targeted killing that some academics like myself still feel are controversial.⁶⁸ Would you say that this is because of the legislative and judicial responses that have legitimized these policies? Is that your theory?

GOLDSMITH: That's my basic theory. I think it has to do with a couple of things, but the main point is that the policies that were controversial and that had less support were not the same policies as we have now. The policies have been changed and when the courts say that a detention in Guantanamo is lawful, that sends a much different and much more comfortable signal to the American people than when the president just says it on his own. And when Congress steps in and says certain interrogation techniques aren't allowed and the people know that the interrogation techniques that are going forward now are taking place within those constraints, they can have more confidence in them. So I think you have to look at what kind of broad political and legal support the policies have and I think, this is a broad generalization but, the American people's comfort with these policies largely tracks those other institutions' comfort with them.

SCHARF: So would you say that the institutional legitimacy has created a new normal where, right after 9/11 the American people weren't quite ready to embrace some of these techniques that were necessary for national security but now that they've been constrained and blessed, the American people now find it comfortable?

GOLDSMITH: I do think that's not the way I would put it, but I think that's an accurate description. I think that we do. I guess I do use the phrase new normal in a slightly different sense in the book, but I do think we are now, after eleven years, where there was, as always happens in war, an aggressive reaction

68. Adam Serwer, "Poll: Americans Approve of Targeted Killing of American Terror Suspects," *MotherJones*, February 8, 2012, <http://www.motherjones.com/mojo/2012/02/poll-americans-approve-targeted-killing-terror-suspects-americans>.

by the president right after an attack, the pendulum has swung back. The other institutions have engaged, We've had debates, very open public debates, lots of leaking of information, and all these issues have been debated. They've run through the mill of Congress and the courts and public opinion and I do think we've got an equilibrium now. I would call it where people are generally comfortable about where we are. Now it could change at any moment and I don't think everything is settled, but I think things are largely settled for now.

SCHARF: Now do you think there was also a role to be played by some of the policy makers in their rhetoric? So, for example, Vice President Cheney spent eight years in office telling the American people that, if we didn't do extraordinary interrogation techniques, we couldn't stop the next terrorist offense against us, and also making the claim, which turned out to be false, that the evidence that was used to locate and kill Osama bin Laden came from these extraordinary interrogation techniques; these things that some people call torture.

GOLDSMITH: So some of the rhetoric of the Bush administration I do think invited unnecessary criticism and I do think sometimes they exaggerated their criticism. I don't know if they exaggerated their claims about the nature of the threat. I think that if you generally look at what the Bush administration said in the last four or five years about the nature of the threat, it's pretty similar to what President Obama says now. But I do think some of their rhetoric was overcharged, and especially their rhetoric about presidential power and the need for it was largely self-defeating.

SCHARF: All right, so we've set the stage for an interesting discussion, we're going to bring in some other experts. It's now time for a short break. Not everyone agrees with Jack's argument that there isn't much difference between the foreign policy approaches of the two candidates. So when we return, we'll bring in the legal director of the Center for Constitutional Rights, a former high-level State Department official, and an international law professor that will all jump into the conversation and we'll try to ferret out what the American people need to know as this election looms. You're listening to *Talking Foreign Policy*. Back in a moment.

SCHARF: Welcome back to *Talking Foreign Policy*. I'm Michael Scharf and I've been talking with Harvard Law professor Jack Goldsmith, the author of *Power and Constraint: The Accountability Presidency After 9/11*. Let's widen the discussion now by bringing in our panel of experts. At the top of the program, I mentioned the phenomenon of war without end. Let me introduce Milena

Sterio, she's been on the program before, she's an international law professor at Cleveland State's Marshall College of Law. Milena, good to have you back.

STERIO: Thank you, it's a pleasure.

SCHARF: From the standpoint of an international law professor and from the standpoint of U.S. constitutional law as well, would you say that the war on terrorism has become a sort of war without end that has shifted the power balance between Americans and their government?

STERIO: Yes, I agree with that assessment. Essentially, under the Bush administration and now under the Obama administration, the approach to some of the policies, for example the targeted killing policy, the drone strikes, has been that the executive makes the decision as to who can be targeted. We have to trust the executive with what the policy is, when it will end, and if it will end. There's really no sort of check and balance on the presidential power to do that. So I think—and the other thing is we don't really know if the war on terror will ever end, what the parameters of that war are, and for all we know, it could be another hundred-year war.

SCHARF: George Bush was the one who coined the phrase 'The War on Terror' and I believe the Obama administration has modified that to be the War on Al Qaeda, but it's still a war in both the administrations' views, right?

STERIO: It's still a war. Under the Bush administration, we were engaged in a global war on terror. Now we're engaged in a war against the Al Qaeda, the Taliban, and associated forces. So if you think of that phrase 'associated forces,' that can be just about anyone.⁶⁹

SCHARF: And you think this rhetoric of war changes the way that the Americans perceive the government and the free range that the government has in taking actions?

STERIO: Yes, because I think if you were to poll...our citizens, I think everyone would agree that at a time of war, things change. Civil liberties can be curtailed. I think that's a relatively well accepted premise and so if the rhetoric is we're at a war, we're engaged in an armed conflict, that, I think, gives a lot of liberty to the executive branch to craft all sorts of policies.⁷⁰

69. Joseph I. Lieberman, "Who's the Enemy in the War on Terror?," *Wall Street Journal*, June 15, 2010, <http://online.wsj.com/article/SB10001424052748703509404575300420668558244.html>.

70. Adam Liptak, "Civil Liberties Today," *New York Times*, September 7, 2011, http://www.nytimes.com/2011/09/07/us/sept-11-reckoning/civil.html?pagewanted=all&_r=0.

SCHARF: Now we're also joined today, in studio, by Mike Newton. Mike was a former military attorney who served as the deputy to the ambassador at large for war crimes issues at the State Department and now he's a law professor at Vanderbilt. Mike's been on with us before. It's good to have you back, Mike.

NEWTON: Thanks, Michael.

SCHARF: Now Mike, you were also a former JAG colonel for many years. Do you agree with Milena's conclusions from that point of view?

NEWTON: Well, from a military perspective for any military operation, the job of a commander in chief is to proscribe a wartime objective.

SCHARF: And are we at war?

NEWTON: Well, in the sense that there's an active enemy that's trying to harm American interests and kill Americans, yes we are; remembering, of course, that it's also an armed conflict, to use the legal sense of the term, that is authorized by both the United States, and UN Security Council, and the Congress of the United States. The problem, of course, being that the scope and the definite military objective is much more vague and uncertain than has ever been the case in American history, I think. And the other paradox is the statistic—the last statistic I saw is that only 0.5 percent of the American people have been directly involved in that. So we're at war in the sense that people conceive of it, as this very distant, very dim, and yet for the American military service members and women on the ground it's very real and very dangerous.

SCHARF: All right, so would you say that the Iraq part of the war is over now? I know that we still have troops there, but Obama says the war is over.

NEWTON: Well, it's true both legally and politically. The sovereign independent state has stood up and therefore they are a sovereign equal like any other. We no longer have the right to simply invoke the wartime law and the flag to do anything we want to do.

SCHARF: Now, in Afghanistan, we're still in war, but there's an agreement between the United States and the Afghan government that we're supposed to be out of there in two years. So, at that point, the war is over in Afghanistan?

NEWTON: In the sense that it changes the legal regime applicable, yes it is.

SCHARF: So will there still be a global war against Al Qaeda that exists after the two geographic wars are over?

NEWTON: Well the issue is then how the United States Congress goes back and reshapes the authorization for the use of military force. I think scholars—and I know Jack has written about this and talked about this—is how you define the enemy and more particularly, when in the context of interrogation policy, how do you define the instate, because at the moment the conflict is over, any articulable legal authority—you’ve got to hold somebody in the absence of a conviction—ends immediately. And so that’s why the lawyers in among us really care about that, and in particular, that’s why the military people care. Remember, the military, from the institutional perspective, wants to win the war and go home. They don’t want to stay deployed for the next hundred years.

SCHARF: But the politicians are saying that this is a war that may last generation after generation.

NEWTON: And the military will dutifully follow the orders of the commander in chief.

SCHARF: Well, the final member of our panel of experts today is Baher Azmy. He’s the Legal Director of the Center for Constitutional Rights in New York City. Baher, thanks being with us today.

AZMY: Thanks for having me, Michael.

SCHARF: So, Baher, you’ve litigated a number of the leading cases arising out of the so-called War on Terror, including those related to indefinite executive detention, extraordinary rendition, and torture. Do you believe that the so-called War on Terror has led to a diminution in our civil liberties?⁷¹

AZMY: Oh, I certainly do. I think that just to underscore one of the points in Jack’s book, some of I think the most egregious practices of the Bush administration from the first term, like extraordinary rendition, secret black sites, incommunicado military detention in Guantanamo, were largely constrained during the Bush administration. But still other, I think, deeply controversial practices have endured across the administrations as Jack describes, and that includes the idea of an indefinite preventative detention regime based on military law principles. For people in Guantanamo, this includes the use of military commissions instead of civilian courts and the dramatic expansion of the targeted killing program.⁷²

71. *Supra* note 7.

72. Detlev F. Vagts, “Which Courts Should Try Persons Accused of Terrorism,” *European Journal of International Law* 14 (2003): 313–26.

SCHARF: Now let me follow up with you on that. I once testified before the House Armed Services Committee about the new Military Commissions Act.⁷³ One of the things I said and I want to get your take on it, is that even if somebody is prosecuted at a military commission and acquitted or let's say prosecuted and given a short sentence and the sentence is over, it is unlikely that they will be released. They, in fact, will be detained even after they're acquitted the rest of their life.

AZMY: Yeah, I think this is a really problematic feature of the Obama administration's description of their justice system. So the way that they initially articulated it is if there is overwhelming evidence of guilt, then we'll put them in the Article 3 civilian trial box because we're certain there will be a conviction. If there's insufficient evidence that would support conviction beyond a reasonable doubt, then we can put them in the military commissions' box and, if there's not enough evidence for any of those two, we'll just indefinitely detain them. And I think that's a really distorted system of justice where the prosecutor shifts the game.⁷⁴

SCHARF: Under the law, Baher, this would only apply to non-American citizens, right? We're not comfortable having American citizens detained forever in Guantanamo.

AZMY: That's—I mean, I think that's somewhat of an open question. Under Supreme Court precedent I think there's—I'd be optimistic that a U.S. citizen could not be detained, but I think the law is not settled on that question.

SCHARF: But there are no U.S. citizens now at Guantanamo.

AZMY: There are no U.S. citizens now in Guantanamo.

SCHARF: But you're saying in the future there could be?

AZMY: Or the question of whether or not a U.S. citizen could be detained in a military brig as Jose Padilla was, which was never was conclusively resolved by the Supreme Court.⁷⁵

SCHARF: And that was in South Carolina?

73. James B. Staab, "The War on Terror's Impact on Habeas Corpus: The Constitutionality of the Military Commissions Act of 2006," *Journal of the Institute of Justice and International Studies* 280 (2008).

74. *Supra* note 7.

75. Abby Goodnough and Scott Shane, "Padilla Is Guilty on All Charges in Terror Trial," *New York Times*, August 17, 2007, <http://www.nytimes.com/2007/08/17/us/17padilla.html>.

AZMY: That's right.

SCHARF: And what about people who have dual citizenship, who are they? Foreigners or U.S. citizens for the purposes of this?

AZMY: I think they retain the rights of U.S. citizens in that circumstance, yes.

SCHARF: Okay, so now, does this mean that you agree with Jack Goldsmith's characterization that President Obama has continued President Bush's national security policies and practices pretty much without change?

AZMY: Yes, I would agree with that...mindful again the distinction that Jack himself makes between the early Bush administration practices and the sort of Bush two practices which I do agree have carried over.

SCHARF: And you're troubled by that, I assume.

AZMY: I am, yeah.

SCHARF: And Jack Goldsmith says there are these checks and these checks have succeeded, but to say that there are some checks is not the same thing as saying that they're sufficient checks. Would you say that Jack is overstating the efficacy of the checks that have constrained presidential power?

AZMY: In general, yes. I mean, I don't think that Congress has played a particularly constructive role here, particularly in relation to closing Guantanamo. They've made it impossible for the president to try the 9/11 conspirators in New York.⁷⁶ They've made it impossible to resettle—or at least extremely difficult to resettle detainees in the United States or even resettle them abroad, I think because of narrow political considerations and some amount of grandstanding. And I think the courts have not been as effective, aside from some sort of blockbuster cases at the Supreme Court. At a kind of retail level I don't think the courts have been dutiful in checking the president's actions.

NEWTON: Can I—

SCHARF: Just hold on a second, Mike, because I'm going to jump in and ask you the follow-up question. I want to focus us a little bit on what the courts have done with Guantanamo Bay. So Mike, this will be a question for you. In 2008, the Supreme Court held that Guantanamo Bay detainees are entitled to judicial review, a process us lawyers know as habeas proceedings.⁷⁷

76. Scott Shane and Benjamin Weiser, "U.S. Drops Plan for a 9/11 Trial in New York City," *New York Times*, January 29, 2010, <http://www.nytimes.com/2010/01/30/nyregion/30trial.html?pagewanted=all>.

77. Richard Brust, "As D.C. Circuit Weighs the Future of Guantanamo Inmates, Some Say

Now the district courts have actually ruled in a number of cases that these detainees have to be released because there's insufficient evidence of guilt or insufficient evidence that they are a continuing threat to the United States. Those cases have been appealed to the Court of Appeals of DC and the DC Court of Appeals has done what, Mike, with these cases?

NEWTON: For the most part, in every case that I know of, they've reviewed the standards of detention and the reasons for detention brought forth by the executive. They've then done what's called a *de novo* review of the evidence. They've looked at all of the evidence, which is very difficult because you remember some of these statements now at this point are a decade old. In some cases of corroboration where people are dead and they have affirmed those so that, no detainee has been released under the order of the DC Circuit Court of Appeals.

SCHARF: Okay, so just to be clear, the district court says you've got to release them. Who's appealing it to the Court of Appeals? Who's bringing these appeals?

NEWTON: The Justice Department.

SCHARF: The Obama administration?

NEWTON: Yes, yes.

SCHARF: So the Obama administration, who says they believe in habeas and that these people if they're proven to be innocent or not to be a threat need to be released, are taking these cases and they're asking the court to keep them in prison in Guantanamo.

NEWTON: Well, this is a really important point that you're getting at which is the balance between the executive obligation to protect Americans, as long as there's a continuing threat and somebody needs to be held—this gets back to what Jack was saying about more than 600, the last count I saw was 602, detainees have been released from Guantanamo Bay, which began early in the Bush administration, accelerated during the second Bush term, and so, the people at that point that they're litigating—

SCHARF: But these are discretionary releases.

NEWTON: Yes. But the ones that they're litigating at that point have been through multiple, multiple filters of review and at that point the executive

Judicial Review Can Harm Military," *ABA Journal*, October 1, 2012, http://www.abajournal.com/magazine/article/detention_dilemma_as_d.c._circuit_considers_guantanamo_inmates_can_judicial/.

branch in the form of the Justice Department really feels like that, for whatever reason, they don't need to be released. And remember that there's about a 28 percent recidivism rate of the ones that have been released.⁷⁸ And so ...these are not just sort of theoretical, legalistic kinds of determinations; they're determinations where American lives and property are in some threat of continuing risk.

SCHARF: Now this is in the DC circuit's opinion; the district court, the fact finders think not. And the DC circuit, which is known as a conservative court, has in every single case that's been appealed to them, reversed the district court and held these people for the rest of their lives in detention in Guantanamo.

NEWTON: That's true, although I don't know that you can simply derive from that that there's this rubber stamp process. I mean, these are federal judges who—I don't think it's appropriate to just to sort of impugn the integrity of and say, well they're all just sort of doing whatever the executive asks them to do. You know, they're federal judges who are really going over the evidence to the extent that they can. And maybe we can quibble about the degree of deference and the processes which they're following, but I just saw a decision just issued just yesterday where the Justice Department argued that—that the rights to counsel terminated at the end of a successful habeas—or, I'm sorry, an unsuccessful habeas petition and the DC circuit ruled otherwise, meaning that even if you lose your habeas petition you have the continuing right to counsel.⁷⁹ So they're not just sort of rolling over and doing what the executive branch asks them to do.

SCHARF: Well to me it sounds like habeas, which was promised by the Supreme Court decision has become sort of an empty promise for these detainees. Baher, what's your take on that?

AZMY: I agree completely, and it wasn't the DC circuit that issued that decision, it was the district court, and we all, the detainees lawyers, are terrified that the government will appeal to DC circuit, get a stay and reverse it, because that is the last court we want to be in. And I think ...of course we can impugn the court. They're generally fair-minded people, but I think if you unpack what the DC circuit has done they have ensured that the government will prevail in every case by crediting—giving the government's evidence a presumption of accuracy, expanding the detention standard far broader than

78. Mark Hosenball, "Recidivism Rises Among Released Guantanamo Detainees," *Reuters*, March 5, 2012, <http://www.reuters.com/article/2012/03/06/us-usa-guantanamo-recidivism-idUSTRE82501120120306>.

79. "The Right to Counsel at Guantanamo Bay," *New York Times*, August 16, 2012, <http://www.nytimes.com/2012/08/17/opinion/the-right-to-counsel-at-guantanamo-bay.html>.

what the district court would have wanted to do, in some cases far broader than what the administration would have argued for, and reviewing factual findings by the district court *de novo*, which a court of appeals shouldn't do. And so, I think *Boumediene*⁸⁰ is not the law of the land anymore and I think—

SCHARF: That being the Supreme Court case from 2008.

AZMY: The Supreme Court decision guaranteeing a meaningful habeas review by courts that is at least somewhat skeptical, or skeptical enough to uphold the purposes of the Great Writ. And so that for me has been an area of great disappointment about the role of the courts.

SCHARF: Well Milena, let me ask you to clarify something that Mike had said about recidivism. He said that there was some percentage—what did you say, Mike, 8 percent?

NEWTON: It's about 28 percent.

SCHARF: 28 percent that are recidivists. Isn't it true, Milena, that the definition of recidivism is quite broad and that even people who have made speeches against the United States count the same as people who joined the battlefield for purposes of that statistic?

STERIO: Yes, it's entirely unclear as to ...we've ...under the Obama administration, even the press, we've used these terms of jihadist, Islamist ...all sorts of terms and it's unclear as to what roles, what kinds of acts, a lot of these individuals have committed against the United States. And so, yes ...we catch somebody making statements against the United States and we say, aha, recidivist.⁸¹ One additional point I would make regarding that is that if we are to detain somebody and it turns out that person actually hadn't done much against the United States, the likelihood then of, after we release them, that person hating the United States and wanting to engage in all sorts of bad activity against the United States is higher, I would argue, and the likelihood that that person's family member will also hate the United States and want to hurt us is also higher. So I think—

SCHARF: What you're saying is if they weren't a security risk when we took them in, after we've kept them in custody down in Flor—in Cuba for eight years, they kind of get angry at us and then they become a security risk?

80. Center for Constitutional Rights, "Legal Analysis: *Boumediene v. Bush* / *Al Odah v. United States*," <http://ccrjustice.org/learn-more/faqs/legal-analysis%3A-boumediene-v.-bush/al-odah-v.-united-states>.

81. *Supra* note 13.

STERIO: Yeah, I think the likelihood is they don't like us very much and all their family members really don't like us very much either. So I think it gets back to being very careful in the first place as to who we detain, who we target, who we go after.

NEWTON: And this is actually the problem with what the DC circuit has done. Now, our basis to hold people under military law and the federal habeas structure rests entirely upon the premise that this person, if released, poses a danger and imminent threat to U.S. interests. That's really the evidentiary standard. And so what Milena is really saying is there's a lot of cases where that's really a difficult case to make and yet we have seen courts that have erred on the side of simply accepting at face value claims to that even in the absence of or the presence of very, very shaky evidence.

SCHARF: Now Baher, when I was researching some of your statements I saw one where you said that President Obama's hands have been tied, not by Congress or the courts, but by the previous actions of the Bush administration, and in particular you said that because they used torture during the interrogations, it's made it impossible for the president to take these cases to ordinary courts. Can you explain that?

AZMY: So I'm not sure when I made that statement but I think it's—I would revise it because I think the Obama administration did try and set a number of cases for criminal trial and then set up a procedure of the Justice Department, the FBI, to send down what they called 'clean teams' and to build a case that was independent of any interrogation statements and that those cases could, in fact, proceed to trial and Attorney General Holder said he was confident we would get convictions as a result of that independent evidence. So it made it harder, but they were able to do it and then ultimately the 'but for' cause, I think, was Congress's decision to withhold funding for any trials that would happen in New York in addition to some, I think, some public and political opposition to bringing terrorist suspects into New York City.⁸²

SCHARF: Now Jack Goldsmith, author of *The Accountable Presidency*, haven't forgot about you there. Let me ask a follow-up about this concept of torture and accountability, which is in the title of your book, and in particular look at the case of John Yoo. John Yoo was the lawyer who had written the so-called torture memos, and when you got into your position, you actually

82. *Supra* note 13.

rescinded those.⁸³ So in the case of John Yoo, he seems to have gotten a pass. How did you see that?

GOLDSMITH: I don't think that John has gotten a pass, and I think that he's been subject to—in fact, he hasn't gotten a pass at all. He's been subject to extraordinary scrutiny, unprecedented scrutiny, I would say, inside the executive branch, in federal court, in the public. You say—by getting a pass I assume you mean that he hasn't been criminally prosecuted. But I don't consider that the only means of accountability and I don't know of any definition of accountability that limits it just to criminal prosecution.

SCHARF: And so you think the story of John Yoo does send a signal for future lawyers to be a lot more careful?

GOLDSMITH: There's no doubt that it does. Ask any national security lawyer in the government about whether they're significantly more careful with what they do and more cautious as a result, not just with what happened to John, but there are a lot of lawyers and they will say absolutely yes.

SCHARF: Well, that's a silver lining in the story. It's now time for a short break. When we return the panelists and I will be talking about the most controversial issue of all; the president's power to order the killing of suspected terrorists, including U.S. citizens, without any judicial review. We'll be back in a moment.

SCHARF: Welcome back to *Talking Foreign Policy*. I'm Michael Scharf, the Associate Dean at Case Western Reserve University School of Law and with me in our studio today are Jack Goldsmith, author of *Power and Constraint: The Accountable Presidency After 9/11*, Baher Azmy, the Director of the Center for Constitutional Rights in New York City, Colonel Mike Newton of Vanderbilt University, and Professor Milena Sterio of Cleveland State University. We've been talking about the president's powers during an endless war on terrorism. Now, I want to look specifically at one of the most controversial aspects of that: the policy of using predator drones to kill suspected terrorists, including American citizens, outside of the battlefield. The issue was discussed in previous broadcasts of *Talking Foreign Policy*, but we have a new collection of experts and I want to begin this segment with a question for Jack Goldsmith. Jack, who was the assistant attorney general of the United States during the Bush administration. Jack, the ACLU brought a lawsuit about the targeted

83. Dashiell Bennett, "John Yoo Granted Immunity for 'Torture Memos,'" *Atlantic Wire*, May 2, 2012, <http://www.theatlanticwire.com/national/2012/05/john-yoo-granted-immunity-torture-memos/51836/>.

killing policy and the court held that it was blocked from reviewing it by the political question doctrine.⁸⁴ You've described this, I believe, as judicial approval of the drone policy, but isn't it more accurate to describe it as a judicial dodge?

GOLDSMITH: I don't think it was—I don't think I quite described it as judicial approval of the drone policy because the judge didn't remark on the policy⁸⁵—he didn't approve the policy but in fact, he didn't even say that it was lawful. What he said was that the Constitution—he interpreted the Constitution—that the Constitution left the issue of the legality of those strikes to the Congress and the president, to the political branches that's what the political doctrine, political question doctrine, means in that context. So I don't think—you can call it a dodge if you'd like. That judges took his obligations very seriously. He interpreted the Constitution on the merits and he said, he held, and I think correctly so, that the Constitution left that issue, that difficult issue about targeting an American citizen in war, to the president and the Congress.⁸⁶

SCHARF: So, in the end the plaintiff lost, the president won, and the perception, at least for the American people is that there has been some kind of judicial—

GOLDSMITH: That's true, and I would say that—that I agree with that. I think that I would even go further, that the *New York Times*' headline is "President Wins Drone Case." And more broadly, I think that President Obama is in a much stronger legal position as a result of that case than he was before that case brought because now he can at least point to one precedent that says, look, the Constitution has been interpreted by an independent branch of the government, a federal judge, who said that this was an issue that was not for courts to decide, it was an issue for the president and Congress to decide.⁸⁷

SCHARF: Now that was a case, I believe, of a plaintiff going in when there was some kind of a rumor that his son was on the kill list and he wanted to

84. Louis Michael Seidman, "The Secret Life of the Political Question Doctrine," *John Marshall Law Review* 442 37 (2004): 442.

85. American Civil Liberties Union, "Targeted Killings," <http://www.aclu.org/national-security/targeted-killings>.

86. Charlie Savage, "U.S. Law May Allow Killings, Holder Says," *New York Times*, March 5, 2012, <http://www.nytimes.com/2012/03/06/us/politics/holder-explains-threat-that-would-call-for-killing-without-trial.html>.

87. Jonathan Ulrich, "The Gloves Were Never On: Defining The President's Authority To Order Targeted Killing In The War Against Terrorism," *Virginia Journal of International Law* 45 (2005): 1029.

get information about that to save his son. Let me ask Baher Azmy, do you think that courts should be able to review targeted killing after the fact? Is that different than this case? So it would be more like a wrongful death action taken against police for excessive or unjustified use of force?

AZMY: We do, and put money where our mouth is because the Center for Constitutional Rights along with the ACLU has filed such a wrongful death action challenging the legality of the targeted killing of Anwar al-Awlaki who was specifically on a kill list,⁸⁸ another U.S. citizen, Samir Khan, who wasn't on a list but was presumably collateral damage and Anwar al-Awlaki's sixteen-year-old son who was killed at an open-air restaurant in a strike two weeks later, and—⁸⁹

SCHARF: And the sixteen-year-old is also an American citizen?

AZMY: He's also an American citizen and was not targeted, was part of a strike at an open-air restaurant that killed a half dozen civilians. And so this litigation argues that any citizen, any civilian, is entitled to the protections of due process; that is, a charge or a trial unless they're directly engaged in hostilities. And your analogy of a wrongful death action is a correct one; that is, a criminal suspect should be apprehended and tried unless he poses some imminent threat to law enforcement. In that situation lethal force can be applied.

SCHARF: I actually didn't know that this case had been filed. What court is that in?

AZMY: That's in the district court in DC.

SCHARF: So you're back in the same court that we were talking about earlier.

AZMY: We're familiar; it's our favorite court.

SCHARF: And the reason these cases all go to that court is because?

AZMY: Well, it's typically where we can get personal jurisdiction over all the defendants.

SCHARF: And the defendants being Obama, the Department of Justice, the folks that are in the federal government in DC?

88. Mark Mazetti, Eric Schmitt, and Robert F. Worth, Two-Year Manhunt Led to Killing of Awlaki in Yemen, *New York Times*, September 30, 2011, <http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html>.

89. Peter Finn and Greg Miller, "Anwar al-Awlaki's Family Speaks Out Against His Son's Death in Airstrike," *Washington Post*, October 17, 2011, http://www.washingtonpost.com/world/national-security/anwar-al-awlakis-family-speaks-out-against-his-sons-deaths/2011/10/17/gIQA8kFssL_story.html.

AZMY: Primarily CIA individuals and the individuals who run the program that identifies who should be put on the list.

SCHARF: Now I want to get back to Milena Sterio, our international law professor, who has spoken and written a lot about this issue. What is the standard that the administration is now using to decide who to kill with these predator drones?

STERIO: So is your question regarding American citizens who are being targeted, or is it just anybody?

SCHARF: Is it a different standard?

STERIO: It is a different standard. Our Attorney General Eric Holder gave a much-anticipated speech in March of this year where he announced what the policy would be regarding targeted killing of American citizens.⁹⁰ Now this only applies to American citizens. It does not apply to non-American citizens. So American citizens can be targeted if they're located abroad, if capture is not feasible, if they're engaged in hostile acts against the United States, if they pose an imminent threat to the United States; so all of these 'ifs' have to be satisfied in order for an American citizen to be targeted. For—

SCHARF: And then who's making this decision?

STERIO: Well, the decision is being made by the executive branch and it's not being checked by anybody before and hopefully—

SCHARF: And when you said the executive branch, I know there were some news reports saying that President Obama himself has these cards that he reads and decides who to say yes to kill and who to say no to kill.⁹¹ Is that accurate?

STERIO: That's a pretty scary account, but the problem, I think, with the drone problem in general is that there's all this secrecy surrounding it because, for the most part, the drones have been operated by the CIA, and so there are no public documents really telling us about how these decisions are made as to who can be targeted. Eric Holder announced what the policy is, but how that's being applied we don't really know.

90. Charlie Savage, "U.S. Law May Allow Killings, Holder Says," *New York Times*, March 5, 2012, available at <http://www.nytimes.com/2012/03/06/us/politics/holder-explains-threat-that-would-call-for-killing-without-trial.html?gwh=51C913503E2445108F32F25E619EC51C>.

91. Jo Becker and Scott Shane, "Secret 'Kill List' Tests Obama's Principles," *New York Times*, May 29, 2012, <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all>.

SCHARF: And that gets right back to what you were saying at the top of the hour, Jack, that what should keep us up at night is what they're not telling us.

GOLDSMITH: I agree, and, while I'm generally supportive of the legality of the drone strikes as they've been conducted, I also think that the administration is keeping too much information from the public. They could do a much better job of disclosing information, especially about the processes and criteria by which these decisions are made.

SCHARF: And how can we get that information? As lawyers, what can we do? File Freedom of Information Act?

GOLDSMITH: There are all sorts of things going on. The truth is—is that the ACLU's and the CCR's first lawsuit against al-Awlaki, the one that failed on the—it succeeded in many respects; it raised the profile of the issue, people in Congress were interested, now there have been tons of leaks to the press, there have been disclosures, there are FOIA cases going on.⁹² We actually know quite a bit more now about what's going on than we did when the first ACLU/CCR case was brought, but the problem is—the thing that really bothers me the most is the level of nondisclosure, combined with what's the obvious level of manipulation by the administration of the secrecy system. They disclosed all sorts of facts through leaks to the press, putting them in a good light and—but then they take this hardcore stance in court, which they say went to state secrets or it's—we can't disclose it.

SCHARF: And if they've said something publicly, they can then turn around and go into court and say I'm sorry, we can't disclose it?

GOLDSMITH: They've walked a very fine line in which they have—in an official capacity winked and nodded but never said, yes, we've done this. They've been very careful with their language not to, quote unquote, confirm the program. But there have been tons of leaks to the press, obviously, with high level officials not named. And in court they argue that the program is still officially classified and it can't be revealed. That gamesmanship is what I think is really appalling about the secrecy policies and the drones. And there's no reason why they can't disclose, in my opinion, a lot more information, and they should.

SCHARF: Baher, has your organization been arguing these cases as well?

92. Center for Constitutional Rights, "Torture FOIA: ACLU, CCR, et al. v. Dept. of Defense, et al.," <http://ccrjustice.org/CCR-v-DOD-torture>.

AZMY: Yes, yes, we're involved in a second litigation challenging the legality of the killing. We have some Freedom of Information Act requests to try and surface some of the justifications for the policy. And just to underscore Jack's point about the CIA's position, in one Freedom of Information Act lawsuit brought by the CIA—sorry, brought by the ACLU—the CIA has taken the official position that it will not confirm or deny the existence of a targeted killing program in court. And the same targeted killing program that Jack talks about in his book that we're all talking about in an Alice in Wonderland way, actually exists.

GOLDSMITH: And that the administration talked about every day, publicly and through leaks.

AZMY: That's right.

SCHARF: Now I just read in today's newspaper that Congress has authorized the use of drones in the United States,⁹³ and there's a debate going on about whether those drones can be armed and potentially do targeted killings or whether they only can be used for surveillance. But that decision hasn't been made yet. Mike Newton, is this something that should also keep us up at night?

NEWTON: I've spoken a lot in public, as Jack has, about the need to be forthcoming. But just to be clear, on the other side is the executive obligation to protect Americans, and in particular, in the context of what Jack calls the 'security bureaucracy,'...there really are sources and methods that don't need to be talked about, either in an open court case or in the *New York Times* that really do have implications, not only for the narrow context of a case, but for the larger, longer term effort in this war without end, if we want to call it that, to protect Americans. I mean, in the case of al-Awlaki there's clear communication between him and the Fort Hood shooter, and that comes out after the fact.⁹⁴ How many other situations are out there like that? Who else is being tracked? What other American lives might be saved? I'm not sure that the administration needs to talk about that, but I think after the fact they absolutely need to talk about as much as they can. And more

93. S. Smithson, "Drones Over U.S. Get OK By Congress," *Washington Times*, February 7, 2012, <http://www.washingtontimes.com/news/2012/feb/7/coming-to-a-sky-near-you/?page=all>.

94. Rehab El-Buri and Mark Schone, "Fort Hood: Hasan Asked Awlaki If It Was Okay to Kill American Soldiers," *ABC News*, December 23, 2009, <http://abcnews.go.com/Blotter/FtHoodInvestigation/fort-hood-hasan-asked-awlaki-kill-american-soldiers/story?id=9410718#.UJ2i5GiE9UQ>.

importantly, for our purposes, the legal criteria, these are real fuzzy kinds of legal criteria that should be talked about.

SCHARF: Now speaking of that—now Milena, you started to tell us that there's one criteria for U.S. citizens and another criteria for non-U.S. citizens. Can you finish that thought?

STERIO: Sure. So regarding U.S. citizens, there's this immanency requirement, which really comes from international human rights law, where you can go after someone only if it's absolutely necessary; only if they're an imminent threat. Regarding non-American citizens, they can be targeted as enemy combatants. Now there's also this term of unlawful enemy combatants, but unlawful and lawful enemy combatants can be targeted equally, and the approach has been that they can be targeted by virtue of their membership in these terrorist organizations. So they do not have to pose any kind of an imminent threat. They just basically have to be a member of Al Qaeda, the Taliban, and the associated forces.

SCHARF: Now I guess I'd feel okay if we were the only ones with the drones, but there's a lot of countries that are getting this technology. It's not even that high tech. And in fact, in Las Vegas there was a drone convention with all the manufacturers and people from all over the world were bidding on the latest drones.⁹⁵ So there's this notion of blowback; can you describe how that might affect us?

STERIO: So here's the problem, we're not—I think the initial assumption, I think what a lot of people don't understand—I think the original assumption might have been we're the only ones that have drones, we're the only ones that are going to use them, nobody else has them, right? Well that's not true. There are many other countries including—well, Israel has been the only other country that's been really forthcoming, but there's Israel, there's other countries, so other countries have them.⁹⁶ We don't know how they're going to use them, and so to the extent that those other nations look to the United States for policy guidance, for moral guidance, I think we'd be much better off with a much more careful drone policy and that policy could be public. We wouldn't necessarily have to disclose in each particular

95. Ben Wolfgang, "Las Vegas Convention Puts Drones on Big Stage," *Washington Times*, August 5, 2012, <http://www.washingtontimes.com/news/2012/aug/5/convention-puts-drones-on-big-stage-debate-still-r/>.

96. Stephen R. David, "Israel's Policy of Targeted Killing," *Ethics and International Affairs* 17 (2003).

case what the surveillance information was, who the person was, but I think we could announce a policy. And I think Israel, for example, has been a lot more forthcoming with their policy.

SCHARF: Mike?

NEWTON: Well, I just want to—I think Milena touches on something critically important. Jack alluded earlier to the shift as the Bush administration went along after the first couple or three years. In part that was driven certainly by the policy bureaucracy and by the intervention of other U.S. government actors, but it was also driven by this dramatically demonstrated need to consult with allies. This idea in the early days that, well, we've got a special mission to protect Americans and it's great if other countries agree with us, but we really don't want that, we really don't need that. I think that's a fundamental watershed. So Milena's exactly right, we really do need to be working with our allies and with other states, to be as transparent as we can, but also to shape the legal regime in a way that going forward long-term really is effectual.

SCHARF: The use of the drones began in the Bush administration but it has accelerated greatly in the Bush—in the Obama administration. Let me return back to Jack Goldsmith. You've written and said that if the Bush administration were doing this, they would get all kinds of pushback, but because it's Obama there's a different response. Can you describe?

GOLDSMITH: Yeah, I think that's right, but I think it works both ways. President Obama is not as much criticized as President Bush when he does aggressive things against terrorists, like targeted killing and ramps up targeted killing. He gets much more criticism than President Bush when he acts softer; when he tries to close Guantanamo Bay and have criminal trials. George W. Bush did those things and he wasn't criticized at all. When Obama does those things, he's severely criticized. So I think there is a symmetry there in our politics that Democratic presidents get more of a free ride when they do aggressive things and much less of a free ride when they do what I call quote unquote, softer things. And it's just a flip mirror image for Republican presidents.

SCHARF: So you're basically saying that there's some segment that votes on the policy and some segment that votes on the person.

GOLDSMITH: Right, and that's especially true in Congress, I think.

SCHARF: Well, we're getting to the end of the program; I want to ask two last questions of this group while you're here. The first one is, if Barack Obama had

been president at the time of 9/11, do you think he would have done things differently? And the second one, and you can answer either of them, is do you think that Mitt Romney, his national security policy, would differ in any significant way from Barack Obama? Let's just go around starting with Milena.

STERIO: Sure, and I'll keep my remarks brief. I'm not exactly sure that President Obama would have done things drastically differently than President Bush did...remember...President Obama is the one who accomplished the mission of killing Osama bin Laden and on a lot of these issues President Obama has really been to the right of center...really in line with the Bush administration policies. Regarding—

SCHARF: The New Republic says that he has a classic Republican foreign policy. Is that something you would agree with?

STERIO: Right, I do. And regarding Mitt Romney, my answer is just going to be, who knows?

SCHARF: Okay, very quickly because we're running out of time, Mike?

NEWTON: With respect to President Obama, a previous President Obama in 2001, it's very difficult to go back and imagine what the country was like in those days and what it was like in Congress. I think maybe policies would have been similar, and in fact, the speed with which those decisions were made and had to be made would have been almost identical. It's very difficult to then predict the precise outcomes from that.

AZMY: I should hope his policy would have been different, of course we can't know. I think one thing I should imagine that would have been different is that he would have listened to the military's advice and applied the Geneva conventions.

SCHARF: And former Assistant Attorney General Jack Goldsmith, the last word on this?

GOLDSMITH: I'll just say, I'll answer the second question, the same reasons that—structural reasons that led Barack Obama to be very much like the late George W. Bush, will in my opinion, if Mitt Romney's elected, lead him to be very much like Barack Obama.

SCHARF: Great way to conclude. You've been listening to *Talking Foreign Policy*. We hope that this program has shed some light on the national security issues that will be debated in the presidential candidate debates in the coming weeks. I want to thank again author Jack Goldsmith and our panel

of experts Director of the Center for Constitutional Rights, Baher Azmy, who has come all the way from New York City, former State Department official Mike Newton who came to us from Vanderbilt in Nashville, and international law professor Milena Sterio, who came about two blocks to be with us today. Thank you all. I'm Michael Scharf, Associate Dean of Case Western Reserve School of Law. Thank you very much. Talking Foreign Policy is a production of Case Western Reserve University and is produced in partnership with 90.3 FM WCPN Ideastream.

Talking Foreign Policy, February 4, 2013 Broadcast

Participants:

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Mike Newton

Shannon French

Milena Sterio

SCHARF: President Obama has selected three very different men to lead his second term foreign policy team. He's picked John Kerry, a Democratic senator from Massachusetts, to be secretary of state, Chuck Hagel, a Republican former senator from Nebraska, to be secretary of defense, and John Brennan, a career intelligence officer, to be director of the CIA. I am Michael Scharf, the host of *Talking Foreign Policy*. In this hour, our expert panel will discuss what the appointments of Kerry, Hagel, and Brennan will likely mean for U.S. foreign policy during the next four years. In the first part of today's program we'll examine their backgrounds, and the next, we'll look at their likely legislative agendas, and in our final part, our experts will forecast where these men are likely to stand on the most important foreign policy issues facing the United States. First, the news.

SCHARF: Welcome back to *Talking Foreign Policy*. I'm Michael Scharf, the Associate Dean at Case Western Reserve University School of Law. Today, our experts will be discussing America's new foreign policy team: John Kerry, Chuck Hagel, and John Brennan. If you're joining this program for the first time, the format we use is sort of a radio version of the McLaughlin Hour.⁹⁷ Our panel consists of a military expert, Mike Newton, an ethicist, Shannon French, and an international law professor, Milena Sterio. Let's start our conversation with Milena Sterio. Milena, you're a professor at Cleveland Marshal College of Law, you've been on the program before, and it's great to have you back.

STERIO: Thank you. It's a pleasure to be here.

SCHARF: Can you give us some background about the three positions: secretary of state, secretary of defense, and director of the CIA? What does each do and which is the most powerful of the trio?

97. Richard Sandomir, "At Lunch With: The McLaughlin Group; Just Another Talk Show? Wronnnngg!," *New York Times*, December 16, 1992, <http://www.nytimes.com/1992/12/16/garden/at-lunch-with-the-mcLaughlin-group-just-another-talk-show-wronnnngg.html>.

STERIO: So all four positions are extremely powerful. The secretary of state and the secretary of defense positions are officially among the four most prominent cabinet positions and in terms of an official hierarchy of positions when you look at the presidential line of succession, The secretary of state position is number four and the secretary of defense is number six. The CIA director is not mentioned but, of course, I think everybody understands how powerful this position is.

SCHARF: And you've mentioned four positions, we're focusing on three, but of course, the fourth is the national security advisor.

STERIO: Exactly. Now, in terms of what they do, The secretary of state heads the State Department, and is basically in charge of foreign relations and diplomacy. The secretary of defense heads the Defense Department, is the head of our army, navy, and air force, The director of the CIA heads all of our intelligence operations. All are extremely powerful positions.

SCHARF: So we're about to have a new foreign policy leadership and it could really make a difference in the direction of our country. Mike Newton, you have joined our program before, it's good to have you back. Mike is a former Colonel in the Judge Advocate General's Corp.⁹⁸ He's now a professor at Vanderbilt. Mike, let me start out with a question for you.

NEWTON: Shoot.

SCHARF: You personally know Susan Rice?

NEWTON: Yes.

SCHARF: You worked with her back when you were at the State Department. She is currently the U.S. Ambassador to the United Nations. And she was President Obama's initial choice to replace Hilary Clinton as secretary of state. Why did Ambassador Rice withdraw her name from the nomination last month?

NEWTON: Well, she's done yeoman's work in the position in New York. The position at the U.S. delegation to the United Nations is an extremely difficult job and she has, by all accounts, done an incredible job behind the scenes, brokering fractured coalitions, and handling very difficult issues. A promotion to secretary of state would have been something that, I think, would have been very much in her personal desires and career interests. But, she politically she had no real choice but to withdrew in the aftermath of

98. U.S. Navy Judge Advocate General's Corps, <http://www.jag.navy.mil/>.

the Benghazi Controversy.⁹⁹ The day after the attack, she went on several talk shows, as the face of the administration, not just to the American people but to the world with what were demonstrably false facts, but from her perspective, she says, “I was using the information that I was provided,” which is actually true. So, the short answer is that I think she withdrew two parts prudence, one part policy. To really keep the focus on advancing U.S. policy interests, knowing that a long drawn-out confirmation battle would detract from our interests at a very critical point in our relations with all of the other things going on in the world.

SCHARF: And that seems to be playing out. It seems that John Kerry is not having a problem with his confirmation. But let me ask you since you know Susan Rice, you know her background as someone who has risen up through the State Department and has fought these battles, from that point of view, whereas John Kerry has come from the legislative side, how do you think Kerry would compare with her in terms of his approach, especially to human rights?

NEWTON: I think that on the human rights portfolio it's important to remember that because we're not seeing a huge change in administration—there will certainly be a number of people at the second and third tiers that are moving in and out, but the structure of the bureaucracy is going to remain in place. On the particular human rights portfolio, in the first term there were some things, such as intervention in Libya, that are potentially very significant for the looming crisis Syria. What Senator Kerry will bring, if he's confirmed, I think is the ability to really engage with Congress in much the same way that Secretary Clinton did. She [Clinton] knew the senators and congressmen and women, they were many of her friends, and that's critically important.

SCHARF: Now, let me go back to Milena. You were telling us about the different roles that these officials play and you mentioned the national security advisor. There are reports that Susan Rice could be named the next national security advisor when Tom Donilon, who currently holds the post, steps down in about a year. How would her appointment to that position affect John Kerry's effectiveness as secretary of state and his access to the White House?

STERIO: Well, I don't think that John Kerry would be undermined in his position in any significant way because in the Obama Administration the

99. Joshua Hersh, “Libya Attack Controversy Becomes Full-Fledged Political Football,” *Huffington Post*, October 28, 2012, http://www.huffingtonpost.com/2012/10/28/libya-attack-john-mccain_n_2035396.html.

positions of secretary of state and national security advisor are distinct positions with different areas of responsibility and authority. Susan Rice, if she were appointed National Security Advisor, would have to work very closely with the president and by all accounts she does enjoy a very close relationship with the president, so that might be a good thing. And from what Mike Newton mentioned earlier, it might be a good thing that we have someone like John Kerry, who has been the chairman of the Senate Foreign Relations Committee and knows the senators and congressmen well; who will be able to work closely with both houses.

SCHARF: Well, I'm thinking back to history, you had a strong national security advisor with Henry Kissinger, and that made all sorts of problems for his secretary of state at the time, William Rogers. Condoleezza Rice, a more recent example, seemed to have more power than the secretary of state, Colin Powell. Let me ask Shannon French. Shannon, you taught at the Navy Academy in Annapolis before coming to Case Western to head the Inamori International Center for Ethics and Excellence, what do you think the relationship would be if someone like Susan Rice is closer to the president in proximity than the secretary of state?

FRENCH: Well, I think one of the points that Milena has already highlighted for us that's significant is that it is not as though John Kerry is not tightly linked to this administration in other ways too. I think the long history that Kerry has established in Washington gives him great respect and he will command that respect with a president as well, so I also think that Susan Rice's relationship won't interfere with John Kerry and he's a heavyweight in this role and he's got big shoes to fill.

NEWTON: Can I disagree slightly with that, though?

SCHARF: Go ahead Mike.

NEWTON: Because the problem in Washington always, and we've seen it lately in the macro, is the paralysis in the policy-making functions. So any time there's a new cadre of top officials, there's always going to be shifting organizational roles and, from my experience in Washington working with the NSC and working with the highest levels of the State Department, that relationship is not just a monolithic relationship, it's always in flux depending on the issue. So it really does come down to a question of here's a disagreement between the upper levels, who has the access, who has the funding, who has the expertise, who has staff to win the day? And the trick is that an

effective national security advisor can really move mountains to move the bureaucracy or, conversely, lock us into bureaucratic gridlock.

SCHARF: All right, now we're sort of starting to psychoanalyze John Kerry and let me ask you, Shannon, as an ethicist, the defining moment in John Kerry's early life was his return from the Vietnam War. And as we know from press accounts, what he did is he threw away his military decorations and protested at the Capital and then he testified before Congress in 1971 and accused his fellow soldiers of systematic atrocities. Do those actions suggest that John Kerry might be more of a pacifist secretary of state than the previous occupants of that office—people like Hillary Clinton, Condoleezza Rice, Colin Powell, and Madeleine Albright?

FRENCH: Well, I mean the moment that you're alluding to is very important, historically, we're talking about over forty years ago now, the young John Kerry, in a similar committee, but in this case speaking about his personal experiences, the horrors that he had seen, and very famously saying this line that has definitely had some traction since then. The quote was, "How do you ask a man to be the last man to die for a mistake?" And that...was John Kerry's point in this hearing. So if you think of that as part of his formative experience, I think it does at least suggest that he would be a cautious secretary of state in terms of committing, particularly ground troops, boots on the ground, to various conflicts. However, having said that, he's not a pacifist. It's one thing to have felt that a particular conflict was unjust or to think that particular tactics and strategies are inappropriate but overall, he's not a pacifist and I don't think that he would shy away from taking military measures. He's going to lean to diplomacy but arguably all secretaries of state lean towards diplomacy.

SCHARF: Well, since we're talking about people who returned from Vietnam, Chuck Hagel, the appointment for the secretary of defense, has a similar background and let me turn to Mike. Mike, you're our military expert. You, yourself, have served in Iraq and Afghanistan. Chuck Hagel, like John Kerry, served in the Vietnam War but unlike Kerry, Hagel felt that the Vietnam War was justified and he blamed the leadership for failing to win a winnable war. Mike, how do you think Hagel's experience in Vietnam will shape his approach to foreign policy and the use of armed forces?

NEWTON: Well in the big picture, the lesson of Vietnam, which I think people who were there—as was my father—learned intimately, and anybody in any other military organization would echo this—is to understand the innovation and comradery and the teamwork that's essential down at the

lower levels, that you're the ones that bear the hardships, bear the greatest burden, and having experienced that personally, I think that Shannon's right. The secretary of state will tend towards diplomacy. That's part of the job description of secretary of state. But the critical lesson out of Vietnam is that the leadership comes from the secretary of defense—both the advocacy for the defense position, but also the ability from on high to give clear guidance and the resources, the time, and the full support of the bureaucracy because that's the frustrating thing from the ground looking up. And what we're really talking about in military terms is someone who can create a fusion between the operational and the strategic level all the way down to the tactical level.

SCHARF: And it's not just the leadership side,; it's also the political leadership. Let me ask Shannon this question. Senator Hagel reluctantly supported the 2003 invasion of Iraq, and then he ended up being one of the few Republican critics of the Iraq war, and then he opposed the so-called surge.¹⁰⁰ What does that tell us about him? Is he going to have the kind of leadership, politically, that Michael Newton says is so important in the position?

FRENCH: Well, I think it's interesting that we're drawing out these parallels with Kerry and Hagel and the strongest parallel that I see is this concern about our actual troops, about the individuals on the ground, what we send them off to do on our behalf, and I think something we haven't mentioned, which is relevant on the biography side with Hagel, is he will be the first person who held an enlisted rank to become a secretary of defense. That's significant to me because this is someone who has seen war from that enlisted person's perspective, very low on the totem pole but doing a lot of the very hard work and facing the wars squarely on. So I am interested to see how he does this. He's also been described as very thoughtful. That he's a reflective person and the seeing both sides and going back and forth on judgment isn't always a sign of weakness. Sometimes it's a sign of getting more information and amending your previous judgment based on the new knowledge. So I'm not negative on him for those points, but he was arguably wrong about the surge, and I think people might highlight that and say this is a case where the reluctance may have prevented something that did in fact prove effective.

SCHARF: We're starting to peel the onion on these individuals, but it's time for another short break. When we return, we'll continue our discussion on America's new foreign policy team. Stay with us.

100. Jesse Singal, Christine Lim, and M. J. Stephey. "January 2007: The Surge." *Time*, March 19 2010, http://www.time.com/time/specials/packages/article/0,28804,1967340_1967355_1968027,00.html.

SCHARF: Welcome back to *Talking Foreign Policy*, brought to you by Case Western Reserve University and WCPN 90.3 Idea Stream. I'm Michael Scharf and I'm joined in studio by Shannon French, the Director of the Inamori International Center for Ethics and Excellence, Professor Milena Sterio of Cleveland Marshall College of Law, and Colonel Michael Newton of Vanderbilt Law School. We've been discussing the backgrounds of the three men who have been selected to head America's Foreign Policy team for the next four years and we were just looking at what Chuck Hagel would mean as head of the Department of Defense. Mike Newton, you said you wanted to jump into that discussion.

NEWTON: Well, I did want to pick up on Shannon's point. I think that one of the subtle things in Chuck Hagel's background as an enlisted man having served on the ground, remember and people forget this, is that the surge was really a ground-up tactical initiative developed from the bottom percolating to the top. People think now in hindsight, oh it was General Petraeus,¹⁰¹ it was the thinkers, it was Washington. No, these were tactical innovations that were done from the ground up, and to the extent that Hagel opposed the surge, what it meant was he had forgotten that basic lesson—that the keys to victory, or in military terms 'mission accomplishment,' are best understood by the people on the ground having to do it and then you've got to listen to them, you've got to empower them, and more importantly, you have to resource them. And if he's forgotten that basic lesson, he'll be a disaster as secretary of defense.

SCHARF: Milena Sterio, you wanted to add something?

STERIO: I just wanted to bring back Susan Rice in the conversation. We had been talking about her earlier and to just sort of wrap this up with bringing her name up again. We've been talking about how Hagel and Kerry, both of their experiences seem to have been shaped by the fact that they both served in the Vietnam War. Well, Susan Rice did not. She is a generation younger than they are and she has actually been quoted as saying, "You know, why do we keep talking about Vietnam? Now we're dealing with completely different issues. Let's just forget about Vietnam." So it is going to be very interesting to see if she were to become the next national security advisor how she deals with Kerry and Hagel on these kinds of issues.

101. Scott Shane and Sheryl Gay Stolberg, "A Brilliant Career with a Meteoric Rise and an Abrupt Fall," *New York Times*, November 10, 2012, <http://www.nytimes.com/2012/11/11/us/david-petraeus-seen-as-an-invulnerable-cia-director-self-destructs.html>.

SCHARF: You know this reminds me of something that was in that new movie, *Lincoln*. Have any of the three of you seen that?

FRENCH: Yes.

STERIO: Yeah, I saw that movie.

SCHARF: Okay, you both have. Milena, then let me ask you this question. So the movie, *Lincoln* is based on the book *Team of Rivals*, by Doris Kearns Goodwin, which is getting a lot of attention along with the movie. Some people have likened Hagel's appointment to the cabinet appointments of Abraham Lincoln. What do you think about that comparison?

STERIO: About Hagel and Lincoln?

SCHARF: Yeah, a team of rivals, someone who is a Republican coming into the democratic fold. How is that likely to work? How often has that happened in the past?

STERIO: It has not happened that often, but I think in this instance it can work because Hagel, on many different occasions, has taken positions more like to the official Democratic Party line than the Republican Party line. I don't see him becoming a source of paralysis. And I don't see a major conflict between him and the president.

SCHARF: So I'm reminded back to the last time we had a Republican secretary of defense during a democratic administration that was during the Clinton administration with Bill Cohen. Mike, you were at that time part of the U.S. delegation negotiating the international criminal court statute. Wasn't the fact that you had the Defense Department headed by a Republican opponent of the ICC something that made it very hard for the Democratic administration to break a log jam and have a good negotiating position?

NEWTON: Well it did create policy paralysis but the problem was lack of presidential leadership. In Lincoln's *Team of Rivals*, they were all of the same party. They were personal rivals and that had as much of an impact as if they were from different political parties. But President Lincoln overcame that. So I don't attach much to labels, the personal rivalries, and the animosities, but the important point to remember is that these are the heads of huge organizations. The secretary of defense, because of the power and the reach and the funding of the Pentagon, is always going to have essentially a disproportionate share of that power. When the State Department wants to do something, they go to the Pentagon, for security, for funding, for transportation, etc. So

here's the problem, it takes presidential leadership and that's the key. There will be inevitable frictions and it takes presidential leadership to both set policy but more importantly to move the bureaucracy and that will in the end determine the success of all three of these new appointments.

SCHARF: And speaking of leadership—well Shannon, that is what you teach, right? So tell us your take is on this.

FRENCH: I just want to add that the point of the *Team of Rivals* was to actually put people in the room who would disagree with President Lincoln and so a lot of this is about what President Obama expects, and what he will tolerate, and what he's going to encourage from his new foreign policy leadership team. It only works if he is, in fact, sincerely inviting challenge and cordial dispute. Otherwise, it really doesn't matter if they are from different parties, if they're all either cowed in some way, or not willing to challenge one another. It doesn't create that healthy atmosphere that you really need for ethical decision making.

NEWTON: And let me just add quickly that there are very troubling signs. The recent reports, for example, that General James Mattis was pushed out prematurely from the central command indicate that President Obama does not in fact tolerate that healthy exchange of ideas vigorous debate regarding military policy.

SCHARF: Well, let's take our microscope which has been looking at Senator Kerry and former Senator Hagel and now let's focus in on the third important new nominee, and that's John Brennan, who's been nominated to be the new director of the CIA. Now let me ask Shannon this question. The press has reported that Brennan wasn't put forward for the position of the CIA four years ago because of the role that he may have played during the Bush administration in approving some of the extraordinary interrogation techniques, which have been so controversial. Those are the things for our listeners that you may have seen in the movie *Zero Dark Thirty*, like waterboarding for example. So what does this mean for his confirmation this time around? Is it going to be a problem for him? Should it be?

FRENCH: I have to admit, of the people we're looking at in our conversation here, Brennan is the one who gives me the most pause and you've shot right to the reason. It's not only the enhanced interrogation, which I don't like those euphemisms, we're talking about torture. It's not only that he's also been associated with leaks and other problems that suggest and I don't

know the full truth I am not enough on the inside to know how much he's involved with decision making there, but it suggests that he is at least associated in people's minds with an era that eroded some of the core values that our military depends on. And I definitely remember, I was teaching at the Naval Academy during the Bush administration, and understanding the effect that it had on the military at many different levels. To be hearing about this gradual chipping away of the rules and to hear it authorized from the highest quarters, this is a corruption of the command climate and we saw many horrible things come out of that, Abu Ghraib, Black Sites, and so forth, and you could pin a lot of harms to that. So I feel like he is a tainted choice. I am not myself on board the Brennan train. I could be convinced otherwise but I need more information.

SCHARF: Now the controversy about Brennan is not just about things that happened in the Bush administration because he was a carryover. In fact President Obama gave him a big promotion to the position of White House counterterrorism czar.

FRENCH: He's also the drone guy.

SCHARF: Yeah, let's get to those questions. Mike, you have held several sensitive positions in the army, JAG, at the State Department. You know how important it is to really have a certain amount of good judgment and discretion in these types of situations. Let me ask you about John Brennan and something that Shannon said. He has sort of a reputation for shooting his mouth off, right? Right after the takedown of Osama Bin Laden, he was reportedly the guy that said Osama Bin Laden came out firing like Butch Cassidy and the Sundance Kid, which we later learned was not true. He was the guy who told the press that the Seal Team had captured Osama Bin Laden's personal stash of porn videos, which we later learned had nothing to do with Osama Bin Laden. And then finally, with respect to use of predator drones, he's the one who said that in the years of their use in Pakistan not a single innocent civilian casualty could be blamed on the use of the predator drones, which apparently is far from the truth. So do you think Brennan has the right temperament for the CIA's top position?

NEWTON: Who in Washington doesn't have a habit of shooting their mouth off? I mean let's be real. I think there is a bigger problem, and in fact I'm going to push back on Shannon just a little bit on this. In terms appointing a new director of the CIA—if not John Brennan, then whom? This is a critically important time in the life of the agency having just been through

the scandal that they've just been through, having just had a forced change of leadership, you've got to have somebody that comes in like Brennan that knows the organizational structure, that knows the mission, and that really can rebuild the role of the agency in a time of transformation. So the public statements you're talking about, some of the allegations about to me are very troubling. Not so much because the initial reports from the killing of Osama Bin Laden were inaccurate but because they signal this desire to use policy processes and intelligence processes for political advantage—that's a huge problem. In fact, that's a trend.

SCHARF: Are you saying that Brennan was doing this as the mouthpiece for President Obama?

NEWTON: I think those are questions that will come up during his confirmation hearing and to be an effective director of CIA he needs to clearly rebut those and say, look, it is the job of the intelligence community, headed by the director of Central Intelligence, to be neutral, to be apolitical, to be diligent in providing the very best advice. We are not the political pawns of this administration or any other administration.

SCHARF: Well, another issue that is almost certainly going to arise in his confirmation hearings is about his very aggressive advocacy for the use of predator drones. And Milena Sterio you have written extensively about predator drones and their use, and their legality, and the politics of that. Tell us what it means to have the CIA director to be somebody who has gone on record as being such a forceful advocate of expanding use of drones—not just abroad, but even in the United States.

STERIO: As we all know, under the Obama administration, the use of drones has increased for both surveillance purposes as well as for targeting operations, and John Brennan has really been the key person to President Obama's drone policy. So, for example, in an April 2012 speech, John Brennan argued that drone strikes are legal both under domestic law as well as under international law, and that there's nothing in international law that would prohibit the use of drones. He also claimed that drone strikes are ethical because of "the unprecedented ability of remotely piloted aircraft to precisely target a military objective while minimizing collateral damage"—these are his words. I don't think that everybody would agree with that assessment of the drone technology. And I have to say that I am with Shannon on this one that I also am a little bit troubled by the choice of John Brennan to head the CIA because of his very aggressive stance on drones and also it's been reported that he

has been an advocate for using drones not just in areas like Afghanistan and Pakistan but for using them in Yemen, and in countries like Mali. So, for some of us that would be a somewhat troubling development.

SCHARF: I think that one thing the hearings will do is give the American people and the Congress the ability to have that detailed discussion, which we haven't really had. We've crept up on the use of drones without having that very public debate. Now let me, speaking of the legislature, ask you Milena to tell us a little bit about the treaty process. The President is very powerful but he can't ratify treaties without the Senate. He can't get executive agreements implemented without the Congress. So what are the treaties that are awaiting approval that have been sort of stacked up during the last four years that are likely to be at issue in the coming years?

STERIO: So, just very briefly, there are three different ways in which the United States can enter into international agreements. If you're talking about treaties, those are authorized by Article Two of our Constitution and there the president needs a supermajority of two-thirds of our senators. Historically speaking, very few of our international agreements have been entered into via the treaty Article Two route. Just to give you a number between 1946 and 1999, the United States completed almost 16,000 international agreements and only 912 of those agreements were treaties. So the other ways in which we can enter into international agreements are congressional executive agreements where the president needs a majority of both houses, the House of Representatives and Senate, to authorize or implement the agreement or sole executive agreements where the president unilaterally enters into international agreements pursuant to his inherent power as commander in chief. So, over the last four years, not many treaties have been approved using that Article Two clause where you need a supermajority of two-thirds of our senators.

SCHARF: But there's a bunch of agreements that are Article Two treaties that are stacked up right now. Some of the ones that come to mind are the Law of the Sea Treaty, some disarmament treaties, and several human rights treaties. Let me ask the panel at large to chime in. Which ones do you think are the most important that will possibly now get a fresh start under the foreign policy team?

NEWTON: Well, understand that this is the process that doesn't just happen with a change of administration and a change of people. Every year the State Department prepares its master priority list and the president approves this. So there's a backlog, a huge backlog, of those treaties. There's an important

principle here, which is when the United States goes out and negotiates an agreement like the Law of the Sea Treaty in good faith, and parties make concessions to obtain our support, and then afterward the Treaty gets locked up in the Senate for decades, this is going to have an effect when we try to negotiate other treaties, whether they're trade agreements or human rights agreements or security agreements. Our treaty partners will say, why should we compromise with you when you're not going to accept the legal obligations? This was a problem in the International Criminal Court negotiations. And it's why I hope the new team can to unlock some of those treaties, particularly the Law of the Sea Treaty.

SCHARF: All right, so several administrations have wanted the Senate to approve the Law of the Sea Treaty. Why is that treaty so important? What are the practical things that we need it for?

NEWTON: Freedom of navigation through the straits of Hormuz, freedom of navigation of U.S. Naval Forces to enforce embargos, freedom of navigation in and around the South China Sea.

SCHARF: What about Russia's claims to oil on the floor of the melting Arctic?

NEWTON: Yes, and Russia's claims up in the Arctic.

SCHARF: So this is a treaty we absolutely need and it's just stuck in the Senate?

NEWTON: The argument has been that we can assert our rights without the treaty under customary international law. But the status of some of the provisions of the treaty as customary law is in dispute, and that approach doesn't give us the benefit of using the treaty's dispute resolution procedures. And I have to say, for me, and my experience negotiating treaties, the United States gets the Law of the Sea Treaty thrown in our face routinely. When other countries say to us, why should we negotiate in good faith when the promises that you have made us you can't keep because your Senate will never approve the treaty? And that's a serious diplomatic problem for the United States.

SCHARF: Shannon?

FRENCH: I just wanted to throw out a related point. You and Mike were talking about the Arctic and, of course, one of the reasons that this is becoming an issue is some of the melting that is occurring because of global climate change is actually opening up new routes that were not available before and

those are becoming points of contention. And that relates to something else that I think we ought to at least put in the mix here that came up already in John Kerry's hearings, and that is that the secretary of state has a role to play in issues regarding climate change, including negotiating and getting the Senate to approve a climate change treaty. I think people are really trying to take his temperature on that and figure out where he stands. There are some environmental groups that are very optimistic that he's going to, for example, try to block the Keystone XL Pipeline that crosses the Canada-U.S. border—it's a State Department issue because it's an international pipeline. And there are others who are concerned that he may seem too squishy on that or they can't tell for sure where he's going to ultimately come down. So there a lot of core environmental related treaties in which John Kerry is going to play an important role.

SCHARF: Do you think as somebody who has actually been the chair of the Senate Foreign Relations Committee, who's been on that committee for three decades, that he will somehow be able to do what Hillary Clinton and President Obama were not able to do the last four years, and that is to break the logjam and have some of these treaties move forward?

FRENCH: Possibly, I mean he has often been reported to have a very good relationship with John McCain, so there's a team of rivals in a way who are in fact good friends and have a background together. So that gives him a position, again, of respect, which I mentioned earlier that might allow him to move some of these treaties forward. I know, also, in his hearings they brought up the concerns about nuclear disarmament. And as always happens, you have people with particular interest in their districts who are worried about if this happens, local jobs will be lost because there are materials and systems that are produced in my state. And Kerry seemed to have the finesse to deal with that and to talk about the practicalities, saying, look, this wouldn't happen overnight, you'd have time to adjust. He would understand what language to give to some of these legislators in order to allow them to speak to their constituencies and make this argument to them. So I think that's something we haven't seen in a while.

SCHARF: Okay, now let's assume that part of the reason that John Kerry was selected was because he might have this ability with his old friendships to get things moving again in the Senate Foreign Relations Committee. Let's go back to the question of what Chuck Hagel brings to the table. And my question for Mike Newton, an army guy from West Point, is this: what do

you think Chuck Hagel's role will be in American military policy in an era of austerity, where there may need to be deep budget cuts for the Department of Defense?

NEWTON: Well, the cynical answer is to be a political weasel. It is a political appointment and so the idea is that you're just the mouthpiece of the president. But remember, in our constitutional structure under a civilian controlled military, he's also the critical liaison between military forces in the field and regional commanders, theatre commanders, and the White House. There's a critical policy role he must play. There's a deep seated fear in the military that Senator Hagel will simply become the mouthpiece of the White House to superimpose, to cram down people's throats in a way that's dismissive of the military professionals, and in doing that will undermines military effectiveness. Clearly it's an area of shrinking resources, but the trick is to get control of the bureaucracy and to make smart cuts. And the great fear is that they won't do that, that it'll just become a political process.

SCHARF: Well, in many ways that's more challenging than even the things that face the secretary of state. It's time for another break, when we come back our experts will discuss how the members of the new Foreign Policy team are likely to respond to the most important foreign policy issues facing the United States in the next four years. Stay with us.

SCHARF: We're back with *Talking Foreign Policy*. This is Michael Scharf, the associate dean at Case Western University School of Law. With me in the studio are ethicist Shannon French, military expert Colonel Michael Newton, and international law professor Milena Sterio. We've been discussing America's new foreign policy team, John Kerry, Chuck Hagel, and John Brennan. In our final segment today, our expert panel will forecast where the new team members are likely to take American foreign policy in the next four years. Shannon, I'm going to begin with you. There have been all sorts of reports about where these people stand. Some people believe that both Kerry and Hagel are two guys who will always error on the side of not intervening; we've heard some of that in our discussion earlier. What do you think this means for humanitarian intervention in places like Syria?

FRENCH: First, the point that needs to be clarified is that the kind of intervention they are most likely to be hesitant about is the actual ground troops type of intervention, a large scale intervention, and one that puts a large number of our troops in peril. I don't think that it is a fair assumption that they will be against interventions by other means, such as the kind of

aerial campaign that the United States led in Libya last year. But second, if you look back to the 1990s, Senator Hagel, himself, called for ground troops in support of the intervention of Kosovo. And I think that John Kerry has made it clear about Syria, that he's had conversations with John McCain about the issue of whether some kind of support for the forces against Assad is appropriate and when and what that support would look like. And he seems very open to at least exploring that. He's talked in the past about trying to negotiate with Assad, but he has made very strong statements that that is no longer possible. He's been quoted as saying that Assad's actions are inexcusable and reprehensible and so forth. So, he's said that the time for talk has passed, and that the clock on his leadership is ticking. These are not the words of someone who is against intervention.

SCHARF: Milena or Mike, do you want to weigh in on this?

STERIO: I really agree with that, and Shannon said earlier how John Kerry isn't really a pacifist. So I agree with the assessment that the question is going to be whether we commit ground troops, probably not unless we really have to but I do think that he would be willing to support other kinds of intervention and in many ways both Kerry and Hagel seem to be tilting more towards a counter terrorism strategy where you use, for example, drones and you really go after the bad guys, neutralize the bad guys, rather than engaging in a ground kind of offensive strategy where you're going to try to protect the good guys. So it is just the question of how it's done, but I don't really see him as a pacifist either.

NEWTON: Yeah, but there is this sensitivity, and Shannon alluded to Kerry's famous quote, "How do you ask a man to be the last man to die for a mistake?" Well, it's only a mistake if the mission fails, and the military is going to have to be put in danger to succeed. So there's a larger issue, which is if you're going to do something in Syria, define a mission, define the terms of success, generate the political support, let the military go in and do their job, resource them properly, give them rules of engagement that are sufficient to accomplish the mission, and let them go in, every military person in the world wants to go in, do their job, secure victory, accomplish the mission, and go home. They're not troubled by being put into harm's way, that's why they're in the all-volunteer force.

FRENCH: You know, that quote that I gave earlier from Kerry about not dying for a mistake is what you're highlighting and I think that there may even be a reluctance with both men to be put into a position of judging

whether this is a mistake or not because of their tie to Vietnam, which you were highlighting would not have necessarily been the case with Susan Rice.

SCHARF: Shannon, let me put this into the context of Afghanistan. I mean those words of Kerry could just as well be said of our exit strategy in Afghanistan. What do you think Kerry and Hagel are likely to do in their approach to our exit from Afghanistan? Are they going to want to quickly pull out all the troops? Are they going to want to leave some? How do you ask someone to be the last man or woman to die in Afghanistan?

FRENCH: Well, I think the strategy we've seen supported so far suggests that we are never going to pull out every last man and woman. That hasn't been President Obama's approach and nothing I've heard from any of these new leaders suggests that they are going to radically change that. So that does mean that we are going to leave people in harm's way, though radically fewer numbers than we have now. But I think we're going to quickly see a clash of this idealistic concept of not letting anyone die for a mistake and recognizing that we're going to have to leave people in these countries even if you do feel it was a mistake to go there in the first place. And I'm not sure how they're going to reconcile that with their own histories.

SCHARF: And our troops are extremely vulnerable in these countries.

FRENCH: Clearly.

SCHARF: Milena, what would you add to that?

STERIO: So, President Obama had announced that basically the United States would withdraw combat troops, would withdraw from any combat role in Afghanistan, by the end of 2014 and right now we have about sixty thousand troops in Afghanistan. So the real question then is come January 2015, how many troops are left there? Do we withdraw fifty-five thousand and leave five thousand, or do we withdraw fifty-seven thousand and leave three thousand? I think Shannon is absolutely right, there are going to be some troops left and there's going to be some danger to those men and women, but the question really is, how many will be left? And it seems like Kerry and Hagel are pushing towards withdrawing more than what President Obama had originally suggested.

FRENCH: They may even push harder on our partners as well, to try to supply some of those remaining troops; I mean that's certainly been another point of contention all along in these conflicts, the vast numbers of U.S. troops versus those of our allies. We do have some excellent strong partners around the world.

SCHARF: They're going to have to be good salesmen because they've got some swamp land to sell.

FRENCH: That's true.

NEWTON: To me, it's not a question of how many people are there, it's a question of what they're doing, and that's the big strategic \$64,000 question. After a decade of war in Afghanistan, we know where we are, and in fact, we know where we would have wanted to be. We are not nearly where we would have wanted to be. For example, there are many, many Afghan forces that simply will not go on patrol without U.S. forces. And frankly, there are many coalition forces that won't go on patrol without U.S. forces or U.S. air cover. So the challenge is to shape a role where we have a designated number of troops but that are resourced appropriately that actually does some good.

SCHARF: Mike, let me draw on your military expertise in another area. In the *Plain Dealer*, which is the local Cleveland newspaper, we have this column that's called "Whatever happened to?" And this is that sort of question. Whatever happened to the Strategic Defense Initiative, which Ronald Regan called Star Wars?¹⁰² I think what happened is that they've continued to be researching it and building it. And the question I have for you is, while they're trying to find places to cut the budget, is Senator Hagel likely to be somebody who is going to be in favor of drastically cutting the SDI? And is that something that is in our interests? Is that something in our allies' interests?

NEWTON: Star Wars is a term I haven't heard since the 1970s in terms of defense policy. But it did understand it did lead to some very important strategic results. You think of the Israelis using the iron dome system,¹⁰³ you think of the fact that the North Korean's just came out several days ago and said we are going to intentionally target our intercontinental ballistic missiles on the United States. So missile defense capacity is clearly, clearly an important U.S. and, frankly, NATO interest. The big problem that will be encountered will be in Eastern Europe, the fate of the deployment of a missile defense system in Poland, which was designed to address a whole range of threats from Iran to North Korea. This is a critical element to the so-called Russian Reset. The reset, the desire to start with a clean slate with the Russians, is not turning

102. Mark Thompson, "Why Obama Will Continue Star Wars," *Time*, November 16, 2008, <http://www.time.com/time/nation/article/0,8599,1859393,00.html>.

103. William Broad, "Weapons Experts Raise Doubts about Israel's Anti-Missile System," *New York Times*, March 20, 2013, http://www.nytimes.com/2013/03/21/world/middleeast/israels-iron-dome-system-is-at-center-of-debate.html?pagewanted=all&_r=0.

out so well. The problem is that the Poles are sitting there having spent a great deal of political capital to support the United States and we've made promises to them, which we may not be prepared to keep. I think beyond just the narrow issue of whether we can defend places with a missile shield or not, there's a larger issue of the credibility of U.S. commitments and the credibility of statements that we make to our friends and allies around the world. And to the extent that people say we cannot trust the United States to keep its word, we have a much bigger strategic problem.

SCHARF: Well, speaking of trusting us to keep our word and what our word means, let me ask Milena about the situation in Iran, which Mike Newton just mentioned. Chuck Hagel has said that preemptive strikes against Iran's nuclear program would be counterproductive. Recently, John Kerry said our policy in Iran is not containment, it's prevention. I don't know, it sounds like those are two things that are in mutual contradiction. So what do you think this means in terms of our approach to Iran in the next couple of months?

STERIO: Well, first of all, if in fact John Kerry thinks we should do something about Iran preemptively, and Chuck Hagel doesn't, I just want to reiterate one point that I think Mike Newton mentioned before—it's going to be up to President Obama to show strong leadership to bring his team together to make sure that we have an effective policy. Chuck Hagel doesn't seem to believe that Iran is such a significant threat that would warrant intervention. John Kerry may seem slightly more in favor of intervening in Iran. Personally, I do not see the United States intervening in Iran over the next three or four years, unless something exceptional were to happen where all of a sudden we found information that Iran is about to do something extraordinarily dangerous.

SCHARF: Now, Shannon, let me ask you. Chuck Hagel is not an empty vessel. He actually is a professor at Georgetown and he's been writing books. One of his books is titled *America: Our Next Chapter*. And in it, he surprisingly emerges as a huge supporter of the United Nations. What will that mean for U.S. foreign policy going forward—to have a secretary of defense, a Republican no less, who is a strong supporter of the UN?

FRENCH: You could see I was sort of chuckling there a little bit because our relationship with the UN has been so uneven in recent years. We have had people in leadership positions, Bolton comes to mind, who have said deeply insulting things about the UN and its existence.

SCHARF: You are referring to John Bolton, the former U.S. Ambassador to the UN?

FRENCH: Right. And he's someone who once stated that the world would be better off without the UN, and now we're talking about a new secretary of defense who has praised the UN and extols its benefits for the United States. I do think, as someone who is an expert in military ethics, that going forward the support for international institutions and international law will positively affect military policy. But at the same time you always run into the issue of whether the UN has any teeth, whether it can enforce international law, and it's not clear to me that Hagel is or will be in any position to significantly strengthen the UN in the way that would make it a more important force.

NEWTON: In this regard, go back to the issue of Iran. Consider the question from the point of view of Israel, which faces an existential threat from a nuclear armed Iran, which has said our goal is to eliminate those Jews from their territory. There are some things the UN does very, very well—delivering medicines, water, humanitarian relief, election monitoring, a whole range of things. But acting in a decisive, expeditious basis to protect sovereignty and lives at risk is not one of them. And if you're the Israelis, you cannot depend on the United Nations, which in the past adopted numerous anti-Israeli resolutions. So in that sense, it's great to talk about what the UN does, but Senator Hagel and Senator Kerry are going to have to focus on the precise line between what the UN is capable of doing and what it is not capable of doing.

SCHARF: And in saying that, I recall during the presidential debates, both candidates said that the UN had been very effective in its crippling sanctions on Iran, and that that was driving Iran back to the table. Milena, do you have thoughts on that?

STERIO: Yeah, so obviously Iran is a very, very difficult issue and I absolutely agree with Mike Newton, that for a country like Israel, Iran poses a direct threat, and I think that it's sort of easy for us here in the United States to debate what that means when we're not the targets of such a direct threat. On any kind of intervention on Iran, with respect to the United Nations, there's always going to be paralysis within the Security Council. The Security Council is the only body that can authorize military action against a country like Iran. It's very likely that countries like Russia or China would veto any kind of proposed military action against Iran. So if Iran were to take it up

another step in the development of nuclear weapons and we were to find out that there's really even more of an existential threat against Israel, we may be in a situation where Israel would have to do something drastic and in that sense, it would be up to the United States to really show whether then we would provide a sort of unilateral support to Israel if the UN were paralyzed.

SCHARF: And speaking about these potential conflicts between the secretary of state nominee and the secretary of defense nominee, John Kerry is known as one of the most pro-Israel members of the Senate, whereas, Chuck Hagel has been criticized as being too tough on Israel for opposing the expansion of Israeli settlement on the West Bank. So they're going to be debating it out on that issue as well. Well, we're almost out of time. Today's program has provided a fascinating look at the Obama administration's new foreign policy team. As always, we hope that we have shed some light where before there was just heated debate. If you want to weigh in on the discussion or suggest a topic for an upcoming broadcast of *Talking Foreign Policy*, just send an email to talkingforeignpolicy@case.edu. Thanks again to our panel of experts, Shannon French of Case Western Reserve University, Mike Newton of Vanderbilt University, and Milena Sterio of Cleveland State Marshal College of Law. I'm Michael Scharf, thank you for joining us. Talking Foreign Policy is a production of Case Western Reserve University and is produced in partnership with 90.3 FM WCPN Ideastream.